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Susan H. Bitensky
Michigan State University College of Law.

Advancing America's Emblematic Right: Doctrinal Bases for the Fundamental Constitutional Right to Vote Per Se

SUSAN H. BITENSKY*

This Article identifies and examines the Supreme Court's longstanding unintelligibility with respect to recognition of a fundamental right to vote per se under the Constitution. In a host of equal protection cases, the Court's refusal to "say what the law is" in this regard has produced a chaotic jurisprudence on the status of the right. Because ours is a constitutional schema consisting of multiple types of rights to vote, the refusal manifests as judicial reliance on and acclamation of some unspecified right to vote. It is refusal by lack of clarity. The unsorted right has led some scholars to conclude that there is a fundamental constitutional right to vote per se. But, a close and by-the-book reading of the pertinent cases shows that the Court has never recognized the latter and provided in its stead a placeholder of counterfeit worth.*

This Article proposes a course correction. To that end, the Article provides an in-depth analysis of additional constitutional provisions, any one of which would serve the Court well in definitively recognizing a fundamental right to vote per se. Such recognition is not just a matter of clarifying constitutional doctrine, important as that is. The advent of

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* Professor of Law, Michigan State University College of Law. B.A. 1971, Case Western Reserve University; J.D. 1974, University of Chicago Law School. I would like to thank Professors Jane S. Schacter and Joshua A. Douglas as well as Armand Derfner, Esq., of Derfner & Altman, for their immensely helpful comments on earlier drafts of this Article. Any errors in the Article are entirely of my own making.

* Marbury v. Madison, 5 U.S. 137, 177 (1803).

the new right, by championing and amplifying the body politic's voice on America's future, should operate as a counteractant against the anti-democratic pressures assailing us.

INTRODUCTION

Voting is an integral element of maintaining democracy.[1] Historically, voting has not always led to democratic government,[2] but it is hard to imagine a democratic government that was not put into place by voting.

Voting is also an expression of an individual's autonomy concerning the way he or she[3] wants to live.[4] And, the act of voting in government-sanctioned elections is that rare volitional expression

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[1] *See* Joshua A. Douglas, *The Foundational Importance of Participation: A Response to Professor Flanders*, 66 OKLA. L. REV. 81, 81 (2013) (stating that "[v]oting is the foundational concept for our entire democratic structure"); Emilee Booth Chapman, *The Distinctive Value of Elections and the Case for Compulsory Voting*, 63 AM. J. OF POL. SCI. 101, 110 (2019) (arguing that voting is central to democratic government); Gilda Daniels, *Democracy's Destiny*, 109 CALIF. L. REV. 1067, 1068 (2021) (declaring that "democracy does not exist without the ability to vote").

[2] Although Hitler's rise to power was not through garnering a majority of electoral votes, it is fair to say that he became Germany's leader via the indirect help of electoral processes. Hitler's appointment as chancellor in 1933 was effectively enabled by a number of Nazi party electoral victories that did not involve him personally. *See How Did Adolf Hitler Happen*?, THE NAT'L WWII MUSEUM, https://www.nationalww2museum.org/war/articles/how-did-adolf-hitler-happen (last visited Feb. 10, 2023); ROBERT GELLATELY, HITLER'S TRUE BELIEVERS: HOW ORDINARY PEOPLE BECOME NAZIS 147–55 (2020) (tracing, during the period beginning with the Reischstag fire, Hitler's rise to power buoyed by legislative elections in which Nazis made a strong showing); *cf.* VOLKER ULLRICH, HITLER: ASCENT 1889-1939, 357–58 (Alfred A. Knopf ed., Jefferson Chase trans., Penguin Random House 2016) (detailing how Nazi propaganda used even mediocre election results to further Hitler's rise to the chancellorship).

Other "strongmen," or authoritarian political leaders, who rose to the helm of their respective countries through the votes of the citizenry include, but are not limited to: Jair Bolsonaro of Brazil, Rodrigo Duterte of the Philippines, Recep Tayyip Erdoğan of Turkey, Narendra Modi of India, Victor Orbán of Hungary, and Vladimir Putin of Russia. *See generally* RUTH BEN-GHIAT, STRONGMEN: MUSSOLINI TO THE PRESENT XIII–XV (2020).

[3] I use traditional pronouns through this Article for ease of reference and not to offend persons who have other gender orientations.

[4] *See* Christopher Munsey, *Why Do We Vote?*, AM. PSYCH. ASS'N: MONITOR ON PSYCH. (June 2008), https://www.apa.org/monitor/2008/06/vote (stating that '"[w]e can think of voting as an expression of the self-concept"' (quoting Dr. Kevin Lanning)); J. ROLAND PENNOCK, POLITICS AND PROCESS: NEW ESSAYS IN DEMOCRATIC THOUGHT 11, 32 (Geoffrey Brennan & Loren E. Lomasky eds., 1989) (averring that voting provides "an opportunity for the exercise of autonomy").

of autonomy which *must* be taken into account by government. Government does not have the legal option of disregarding or minimizing a vote once it is properly cast.[5]

The centrality of voting to a democratic society and to each voter's autonomy makes it logical to assume that the right to vote per se would be enshrined in that society's foundational laws. Until very recently, America touted itself as an—if not *the*—exemplar of democratic government.[6] Our country abounds in governmental elections ranging from those for local drainage commissioner to the

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[5] *E.g.*, Reynolds v. Sims, 377 U.S. 533, 554 (1964); United States v. Classic, 313 U.S. 299, 315 (1941); Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L. J. 1397, 1438 (2002); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 628 n. 116 (1982); *cf.* Cass R. Sunstein, *The Equal Chance to Have One's Vote Count*, 21 LAW & PHIL. 121, 121 (2002) (asserting the existence of a constitutional "right to have an equal chance to have one's vote count").

[6] *See* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 1–2 (2018) (observing that, although all democracies are vulnerable, "the one in which we live [United States] has somehow managed to defy gravity" and that the features of our democracy "should inoculate us from . . . democratic breakdown"); *A Year After Capital Riot, Americans Fear for Their Democracy: Polls*, FR. 24 (Feb. 1, 2022, 7:06 PM), https://www.france24.com/en/live-news/20220102-a-year-after-capitol-riot-americans-fear-for-their-democracy-polls (reporting on Americans' previous pride in their democracy); Bruce Stokes, *Poll Shows Americans Don't Believe in "American Democracy*," THE GER. MARSHALL FUND OF THE U.S. (Dec. 21, 2021), https://www.gmfus.org/news/poll-shows-americans-dont-believe-american-democracy (alleging that the "image of the United States as the apotheosis of democratic governance has long been an important element of it global soft power").

During the past few years there has been a sharp downward slide in Americans' pride and confidence in the nation's democracy. *A Year After Capital Riot, Americans Fear for Their Democracy: Polls*, *supra* note 6 (relaying that Americans' pride in their democracy "has dropped sharply, from 90 percent in 2002 to 54 percent now"); Stokes, *supra* note 6; Daniel A. Cox & Samantha Goldstein, *Few Americans Are Confident in American Democracy, But Younger Americans Are Especially Skeptical,* SURVEY CTR. ON AM. LIFE (Mar. 8, 2021), https://www.americansurveycenter.org/few-americans-are-confident-in-american-democracy-but-younger-americans-are-especially-skeptical/ (chronicling that, as of 2021, 70 percent of Democrats and 66 percent of Republicans believed that "American democracy only serves the interests of the wealthy and powerful").

mega face-offs for U.S. President.[7] Candidate campaign ads have correspondingly become a ubiquity and bane of our cultural environment.[8] We are awash in the trappings and fanfare of democracy.

Whether all of this has led to a genuine democracy for the American people is another question involving many complex facets. From a constitutional scholar's perspective, however, something is sorely amiss. Despite the expectation that a democratic America would have indelibly written a fundamental right to vote per se into the Constitution, the right's esse and sum are unexpectedly elusive.[9] Indeed, there is a thriving dispute within the legal academy over whether the U.S. Supreme Court has recognized the right.[10] The Court itself has twice declared that there is

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[7] *See Politics 101: What Are the Different Types of Elections in America?,* MASTER CLASS, https://www.masterclass.com/articles/politics-101-what-are-the-different-types-of-elections-in-america (last updated Sep. 2, 2022) (summarizing that throughout each year, there are many elections for a "wide array of offices" in the United States, such as federal elections, state elections, municipal elections, partisan primary elections, nonpartisan primary elections, caucuses, etc.).

[8] *See* Danielle Kurtzleben, *Why Are U.S. Elections So Much Longer Than Other Countries'?,* NPR (Oct. 21, 2015, 10:16 AM), https://www.npr.org/sections/itallpolitics/2015/10/21/450238156/canadas-11-week-campaign-reminds-us-that-american-elections-are-much-longer (referring to the "perpetual electioneering" in the United States); Hugh Heclo, *Campaigning and Governing: A Conspectus*, *in* THE PERMANENT CAMPAIGN AND ITS FUTURE 1, 16–17 (Norman J. Ornstein & Thomas E. Mann eds., 2000) (observing that in America political campaigning is nonstop).

[9] Richard Briffault, *Three Questions for the "Right to Vote" Amendment*, 23 WM. & MARY BILL RTS. J. 27, 27 (2014) ("[T]he right to vote per se is nowhere guaranteed.").

[10] *Compare*, *e.g.*, Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 YALE L. & POL'Y REV. 471, 472 (2016) (concluding that there is no federal constitutional right to vote per se); Heather K. Gerken, *The Right to Vote: Is the Amendment Game Worth the Candle*?, 23 WM. & MARY BILL RTS. J. 11, 11 (2014) (concluding that there is no federal constitutional right to vote per se); Briffault, *supra* note 9, at 27 (concluding that there is no federal constitutional right to vote per se); Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 ELECTION L. J. 559, 559 (2004) (concluding there is no federal constitutional right to vote per se), *with*, *e.g.*, Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2108 (2018) (concluding that there is a federal constitutional right to vote per se); Atiba R. Ellis, *A Price Too High: Efficiencies, Voter Suppression, and the Redefining of Citizenship*, 43 SW. L. REV. 549, 555 (2014) (concluding that there is a federal constitutional right to vote per se); Ryan J. Silver, Note,

absolutely no such right,[11] while, more often and periphrastically, sounded as if there is.[12] Although all of the foregoing pronouncements have been made in litigation arising under the Equal Protection Clause, the Court has never analyzed head-on the precise nature of the right in issue or how it (whatever it is) is inferable from the Clause.[13] The Court's vacillation and vagueness

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Fixing United States Elections: Increasing Voter Turnout and Ensuring Representative Democracy, 10 DREXEL L. REV. 239, 243–45 (2017) (concluding that there is a federal constitutional right to vote per se); Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 HARV. C.R.-C.L. L. REV. 1, 2, 7 (2009) (concluding that there is a constitutional right to vote per se).

Some scholars point out the confused status of a fundamental right to vote per se under the Constitution, but without taking a position on whether the right exists or not. *See*, *e.g.*, Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 143 (2008) (remarking that a federal constitutional right to vote per se is "not always" fundamental); Jane S. Schacter, *Unenumerated Democracy: Lessons from the Right to Vote*, 9 U. PA J. CONST. L. 457, 464–65, 473–74 (2007) (discussing the Court's waffling on whether there is a federal fundamental constitutional right to vote per se, but declining to weigh in on the merits of the controversy).

[11] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 n.78 (1973); *see* Bush v. Gore, 531 U.S. 98, 104 (2000) (positing that there is no right to vote for electors for the U.S. President).

[12] *See*, *e.g.*, Reynolds v. Sims, 377 U.S. at 533, 554 (1964) (enunciating that "the Constitution . . . protects the right of all qualified citizens to vote"); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667 (1966) (reiterating that "'[t]he right of suffrage is a fundamental matter in a free and democratic society'") (quoting from Reynolds, 377 U.S. at 667); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (declaring the right to vote is "a fundamental political right, because preservative of all rights"); Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (asserting that Article 1, § 2 of the Constitution establishes a right to vote).

[13] My research did not unearth any equal protection cases in which the Court analyzed whether a fundamental right to vote per se can be inferred from the Equal Protection Clause.

Perhaps this is a fit place to note that I came across one equal protection case in which the Court inferred from Article 1, § 2 of the Constitution a right to vote for members of the U.S. House of Representatives. Wesberry v. Sanders, 376 U.S. 1, 17 (1964). The *Sanders* Court did not dub the right as fundamental; nor did it state that the right extends beyond elections vis-à-vis the one house of Congress. *See id.* Moreover, the *Wesberry* Court was not making any substantive leaps since Article I, § 2 patently requires that House members be chosen "by the People of the several States." U.S. CONST. art. I, § 2.

indicates that, professorial debates aside, non-recognition is ineluctably the current status quo.

Perversely, as the law has reached this juncture, the populace's call for protection of the right has gotten more voluble and widespread.[14] Following the 2020 presidential election, state legislatures, in the name of ameliorating fraud, enacted measures making voting more difficult[15] and vote tallying less neutral.[16] A collective cry then went up that the right to vote was under assault, and a determined

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By the way, it is intriguing to contemplate whether the Court avoided analyzing inferrability from the Clause *because* of the failure to adequately identify the right.

[14] *E.g.*, *Protect the Vote in November 2022*, UNION OF CONCERNED SCIENTISTS (Jan. 6, 2022), https://www.ucsusa.org/resources/protect-vote-november-2022; Kristen Clarke, *Voter Intimidation Is Surging in 2020. Fight for the Right that Begets All Other Rights,* USA TODAY (Oct. 27, 2020, 12:01 PM), https://www.usatoday.com/story/opinion/2020/10/27/voter-intimidation-surging-2020-protect-minority-voters-column/6043955002/ (reporting that in 2020, the National Lawyers' Committee for Civil Rights Under Law received over 100,000 calls to the Committee's Election Protection hotline from persons fearful about voter intimidation); Universal Voting Working Group, *Lift Every Voice: The Urgency of Universal Civic Duty Voting* (Preamble), BROOKINGS (July 20, 2020), https://www.brookings.edu/research/lift-every-voice-the-urgency-of-universal-civic-duty-voting/ (expressing "a sense of alarm and moral urgency" causing the working group "to fight back against legal assaults on voting rights guarantees and the proliferation of new techniques and laws to keep citizens from casting ballots"); Fred Redmond, *Redmond: Voter Suppression Is Discrimination,* AFL-CIO (Feb. 25, 2022), https://aflcio.org/speeches/redmond-voter-suppression-discrimination (stating that workers are facing serious threats in the voting arena, including voter suppression and gerrymandering).

[15] *See Voting Laws Roundup: February 2022*, BRENNAN CTR. FOR JUST. (Feb. 9, 2022), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2022 (publicizing that, as of January 2022 and in response to the myth of voter fraud, "legislators in at least 27 states have introduced, pre-filed, or carried over 250 bills with restrictive [voting] provisions"); *Voting Laws Roundup: October 2021*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021 (conveying that, between January 1 and September 27 and in response to alleged voter fraud, a minimum of 19 states passed 33 laws that made voting harder).

[16] *See Voting Laws Roundup: October 2021*, *supra* note 15 and accompanying text (telling of an "unprecedented uptick" since 2021 in state bills facilitating an assault on election integrity and purportedly responding to claimed voter fraud).

political and litigative push-back began.[17] One result of all this is that the "right to vote" has become a volatile flash point.

It is incumbent upon the high Court to give Americans a durable and definitive answer concerning the existence of a fundamental constitutional right to vote per se in governmental elections. Because lawsuits producing a ruling on the issue would normally take a long time and because the need is urgent, this Article is meant to be a stepping-stone, if not an accelerator, in that direction by pulling together in one place viable constitutional theories, any one of which may serve as a solid basis for judicial recognition of the right.[18]

The Court's unmistakable recognition would, at a minimum, close a strange chapter in the nation's constitutional jurisprudence.

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[17] *See*, *e.g.*, Reid J. Epstein & Nick Corasaniti, *Inside Democrats' Scramble to Repel the G.O.P. Voting Push,* N.Y TIMES (May 7, 2021), https://www.nytimes.com/2021/05/07/us/politics/democrats-republican-voting-rights-html (recounting that Democrats were fashioning legal strategies to defang newly enacted voting restrictions and were politically pressuring the White House, Congress, and the Justice Department to act toward the same end); Hadriana Lowenkron, *Here's How Activists Are Challenging Voting Restrictions,* BL (July 13, 2021, 2:42 PM), https://www.bloomberg.com/news/articles/2021-07-13/how-activists-are-challenge-new-voter-laws (citing as an example of the lawsuits challenging voter suppression laws, one against a Kansas law effectively criminalizing special assistance provided to persons who need help casting a ballot); Press Release, U.S. Dep't of Just. Off. of Pub. Aff., Justice Department Files Lawsuit Against the State of Texas to Protect Voting Rights (Nov. 4, 2021), https://www.justice.gov/opa/pr/justice-department-files-lawsuit-against-state-texas-protect-voting-rights#:~:text=The%20U.S.%20Justice%20Department%20announced,into%20law%20in%20September%202021 (announcing the commencement of Justice Department litigation brought against Texas statute that limits voter assistance at the polls and the acceptability of absentee ballots); Simone Pathe & Kelly Mena, *Black Faith Leaders Push Back After Elimination of Sunday Voting in One Georgia County*, CNN (May 21, 2022, 6:01 AM), https://www.cnn.com/2022/05/21/politics/voting-2022-primary-georgia/index.html (reporting that community leaders in a Georgia county held a "Souls to the Polls" event to protect the option of Sunday voting); Jane C. Timm, *New Polls Suggest Broad Support for Democrats' Voting Rights Bills,* NBC NEWS (Aug. 30, 2021, 4:32 AM), https://www.nbcnews.com/politics/elections/new-polls-suggest-broad-support-democrats-voting-rights-bills-n1277837 (describing that a majority of voters in seven states favor elements of two federal bills protective of the franchise, the For the People Act and the John R. Lewis Voting Rights Advancement Act).

[18] *See* discussion *infra* Part IV.

It is, or should be, an embarrassment for the Justices to be at sixes and sevens on this. The dithering and impenetrability not only reflects on them, but clouds the nation's commitment to representative governance. In fact, decisive judicial recognition has considerable promise for preserving and strengthening America's democratic institutions. The potential stems, in part, from the demanding levels of review typically used by the Court to assess the constitutionality of governmental regulation impinging on fundamental constitutional rights.[19] Heightened judicial review is not, however, the full story.[20] As will be seen, there are other important ways in which the Court's recognition of the right to vote per se as fundamental under an appropriate constitutional clause might well assist in keeping the "barbarians"—a.k.a. would-be autocrats—outside the gate.[21]

Incidentally, I should mention that there has been some political and scholarly exploration of amending the Constitution to achieve a fundamental right to vote per se.[22] This effort is most welcome from my perspective, though the amendment process is notoriously difficult and slow.[23] Then again, litigation making it to the Supreme Court is no swift downhill slide either.[24] Whichever route gets us to the finish line fastest is plainly best. This Article, however, focuses exclusively and comprehensively on judicial recognition of the right.

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[19] *See* discussion *infra* Part II.

[20] *See* discussion *infra* Part III.

[21] *See* discussion *infra* Part III.

[22] *See* Raskin, *supra* note 10, at 559; Jamin B. Raskin, *What's Wrong with Bush v. Gore and Why We Need to Amend the Constitution to Ensure It Never Happens Again*, 61 MD. L. REV. 652, 694–96 (2002) (setting forth a proposed constitutional amendment consisting of the right to vote per se). *But see* Gerken, *supra* note 10, at 11–13 (opposing a right-to-vote amendment to the Constitution because the amendment will not fulfill its proponents' hopes and because the amendment process is a "heavy lift").

[23] *See* Gerken, *supra* note 10, at 12–13 (detailing the burdens of getting Congress to initiate the amendment process, getting three-quarters of the states to ratify a proposed amendment, and using large amounts of resources that might better be directed to other endeavors).

The procedures singled out in the Gerken article for amending the Constitution come from Article V. U.S. CONST. art. V.

[24] *See* discussion *infra* Part I.

The rest of this Article is divided as follows. Part I surveys what the federal Constitution literally says about voting and elections.[25] Part II is an exposition of U.S. Supreme Court cases pertaining to a fundamental right to vote per se under the Equal Protection Clause.[26] Part III sets forth additional constitutional clauses that are eligible to accommodate an implied fundamental constitutional right to vote per se in governmental elections.[27] Part IV explores how such recognition of the right would contribute to making our democracy whole.[28]

I. CONSTITUTIONAL TEXT ON VOTING AND ELECTIONS

Nowhere does the Constitution, with or without amendments, explicitly set forth the right to vote per se.[29]

The 1787 Constitution only discusses the related subject of federal (not state) elections.[30] Article I, Section 3, had asserted that U.S. senators were to be selected by state legislators;[31] Section 3 was later modified by the Seventeenth Amendment to require that senators be "elected by the people" from each state, state by state.[32] This part of the Amendment echoes similar phraseology from Article I, Section 2 concerning elections to the U.S. House of Representatives, the members of which are to be "chosen . . . by the People of the several States."[33]

The construction of these provisions seems awkward. Use of the passive voice seems to diminish the role of the people so as to render the statements almost tautological, i.e., that elected senators and representatives shall be elected. The language also leaves open the question of who "the people" are. We are told very little on this

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[25] *See* discussion *infra* Part I.

[26] *See* discussion *infra* Part II.

[27] *See* discussion *infra* Part III.

[28] *See* discussion *infra* Part IV.

[29] *See* Michael Wines, *Does the Constitution Guarantee a Right to Vote? The Answer May Surprise You*, N.Y. Times (Oct. 26, 2022), https://www.nytimes.com/article/voting-rights-constitution.html.

[30] *See infra* notes 31–34 and accompanying text.

[31] U.S. CONST. art. I, § 3.

[32] U.S. CONST. amend. XVII.

[33] U.S. CONST. art. I, § 2.

score. Article I, Section 2 merely provides the snippet that "the Electors" of House members are to be the same as those for the "Electors of the most numerous Branch of the State Legislature."[34] The Seventeenth Amendment mirrors the foregoing qualifications for those who elect senators.[35] By default, the who-question is thus shunted off to the states.

The other two relevant provisions in the original Constitution are devoted to the nuts and bolts of holding elections for federal legislators and the U.S. President.[36] Article I, Section 4 declares that state legislatures must set "[t]he Times, Places and Manner" of elections to Congress, subject to the latter's power to "make or alter such Regulations, except as to the Places of choosing Senators."[37] With respect to presidential elections, Article II, Section 1 provides for the Electoral College and leaves it to each state legislature, within certain parameters, to determine the qualifications of that state's electors.[38]

In sum, the original Constitution sets some of the mechanics for federal elections while simultaneously putting all other responsibility for them on the states. Consistent with this minimalist approach, the document omits any reference to a right to vote and steers clear of directly or indirectly referencing voters. It is a puzzling lacuna for a country committed to democracy—that is, until the history surrounding the Constitution's adoption is taken into account. The document's eighteenth-century drafters,[39] true men of their time, were highly prejudiced[40] and deeply fearful of

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[34] *Id*.

[35] U.S. CONST. amend. XVII.

[36] *See* U.S. CONST. art. I, § 4; U.S. CONST. art. II, § 1.

[37] U.S. CONST. art. I, § 4.

[38] U.S. CONST. art. II, § 1.

[39] The Constitutional Convention first met in Philadelphia on May 25, 1787. *See U.S. Constitution Ratified*, HISTORY (Nov. 24, 2009), https://www.history.com/this-day-in-history/u-s-constitution-ratified. Deliberations over the future Constitution's contents took three months. *Id.* By September 17, 1787, the present U.S. Constitution was ready for signature. *Id.*

[40] *Compare ERA Explainer*, EQUALITY NOW, https://www.equalitynow.org/era_explainer/ (last visited Mar. 17, 2023) (noting that the original authors of the Constitution "were all white, landholding . . . men"), *with* Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482, 1499–1500 (1985) (pointing out that the Constitution was authored by "propertied, white males who had no strong

creating a democracy on behalf of anyone other than white, land-owning males.[41] From this vantage point, the above-cited provisions are a period piece that still has the force of law. There is consequently not much to be gained in looking for an implied fundamental right to vote per se amongst its mingy wording.

Reflecting a more enlightened era since the end of the Civil War, six amendments expressly dealing with voting were later added to the original Constitution.[42] Four of them forbid federal or state governments from denying or abridging, on the basis of certain enumerated criteria, people's right to vote.[43] More specifically, the prohibited interference in the Fifteenth Amendment is "on account of race, color, or previous condition of servitude";[44] in the Nineteenth Amendment it is "on account of sex";[45] in the Twenty-Fourth Amendment it is "by reason of failure to pay any poll tax or other tax" in a federal election;[46] and in the Twenty-Sixth Amendment it is "on account of age" with respect to persons "who are 18 years of age or older."[47]

Finally, Section 2 of the Fourteenth Amendment also bears on voting by providing for a reduction of a state's seats in the U.S. House of Representatives if the state denies or abridges the right to vote "to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States . . . except for participation in rebellion, or other crime."[48] The Twenty-Sixth Amendment later modified that age specification to eighteen.[49]

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incentives to attend to the concerns and interests of the impoverished, the nonwhites, or nonmales who were alive then"). *See generally* Thurgood Marshall, *The Constitution: A Living Document*, 30 HOW. L.J. 915, 915 (1987) (referring to racial and gender omissions and other inequities plaguing the original Constitution).

[41] *See ERA Explainer*, *supra* note 40; Simon, *supra* note 40; *see generally* Marshall, *supra* note 40.

[42] *See* U.S. CONST. amends. XIV, XV, XVII, XIX, XXIV, XXVI.

[43] Another amendment, i.e., the Seventeenth, makes U.S. Senators directly electable by the people rather than by state legislators. *See* U.S. CONST. amend. XVII.

[44] U.S. CONST. amend. XV, § 1.

[45] U.S. CONST. amend. XIX.

[46] U.S. CONST. amend. XXIV, § 1.

[47] U.S. CONST. amend. XXVI, § 1.

[48] U.S. CONST. amend. XIV, § 2.

[49] *See* U.S. CONST. amend. XXVI, § 1.

It may be tempting, at first glance, to try inferring a right to vote from the syntax of the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. A deeper dive, however, soon reveals that these Amendments interdict certain types of discrimination in denying or abridging a person's right to vote without there being a constitutional right to vote per se in the first place.[50] To comprehend this constitutional twist, it may be helpful to think of each Amendment as both assuming *arguendo* the existence of the generic right, sans differentia, and also as protecting it in a negative sense by barring government from interfering with its exercise on the basis of race, sex, etc.[51] Like the rest of the above-described constitutional text, though, none of the amendments can be said to affirmatively assert, upfront or by inference, a fundamental constitutional right to vote per se.[52]

II. U.S. SUPREME COURT CASES PERTAINING TO A CONSTITUTIONAL RIGHT TO VOTE PER SE UNDER THE EQUAL PROTECTION CLAUSE

A. Reynolds*,* Harper*, and* Kramer

Modern federal constitutional law on the right to vote goes back at least to the 1960s when the Court decided *Reynolds v. Sims*,[53] *Harper v. Virginia Board of Elections*,[54] and *Kramer v. Union Free School District No. 15*.[55] *Reynolds*, predicated on the Fourteenth Amendment's Equal Protection Clause,[56] famously imposed the "one-person-one-vote" formula on apportionment of seats in state

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[50] *See* U.S. Const. amends. XVII, XIX, XXIV, XXVI.

[51] *See* Lisa Tetrault, *What Right to Vote? There's a Lie at the Heart of American Democracy*, N.Y. DAILY NEWS (Aug. 22, 2020, 5:00 PM), https://www.nydailynews.com/opinion/ny-oped-what-right-to-vote-20200822-ha4p5bwecnf2rpbhfcs46rizpy-story.html (characterizing the constitutional amendments that forbid various types of discrimination vis-à-vis voting as merely the elimination of certain restrictions on voting); Briffault, *supra* note 9, at 29 (describing the existing constitutional amendments on voting as "negating various grounds for denying the vote").

[52] *See* Briffault, *supra* note 9.

[53] Reynolds v. Sims, 377 U.S. 533, 568 (1964).

[54] Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665 (1966).

[55] Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 633 (1969).

[56] U.S. CONST. amend. XIV, § 1.

legislatures.[57] The standard was meant to avert individual vote dilution in state legislative elections so that each person's vote would be equal in weight to any other person's vote.[58] Because the case had to do with this objective, the majority opinion is filled with observations about the need to preserve equality among voters "standing in the same relation."[59] The Justices, however, neglected to nail down the sort of voting right which unequally weighted votes trench upon.[60] Is it a fundamental right to an equal vote or a fundamental right to vote per se?[61] The majority opinion conspicuously omits any reference to the latter.[62]

I suggest that the posture of *Reynolds* as an equal protection suit about fair legislative apportionment of seats, as well as the majority opinion's evident absorption in comparing vote valences to each other, means that the decision must have pivoted upon a fundamental equal protection right to an equal vote.[63] Yet, the opinion is copiously laced with language embracing an uncategorized constitutional right to vote, e.g.:

> Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized [by the Court] that all qualified voters have a constitutionally protected right to vote, and to have their votes counted.[64]

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57 *Reynolds*, 377 U.S. at 558, 568–69, 576.

58 *Id.* at 568.

59 *See, e.g.*, *id.* at 565, 568.

60 *See id.* at 533-87.

61 *See* Schacter, *supra* note 10, at 462 (offering that "in terms of both its holding and its justification, the case was about voting equality, not voting per se . . . .'The emphasis on citizens having an "equally effective voice" in elections . . . signals that *Reynolds* was grounded in ideas of political equality, not unfettered political liberty'" (citation omitted)).

62 *See Reynolds*, 377 U.S. at 533–87.

63 *See* Schacter, *supra* note 10, at 462.

64 *Reynolds*, 377 U.S. at 554 (citations omitted).

> . . . And history has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.[65]
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> . . . .
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> 'No right is more precious in a free country than that of having a voice in the election under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.'[66]
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> . . . .
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> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society . . . .[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . . .[67]

Three things stand out about the quoted verbiage. There is a lot of it. It is impassioned. It uses the phrases "right to vote" and "right to suffrage" over and over again.[68] But, if my *Reynolds* analysis is correct, the verbiage is also dicta that should be of little legal consequence.[69] And, so, one wonders why the *Reynolds* Court ornamented

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[65] *Id.* at 555 (citations omitted).

[66] *Id.* at 560 (citations omitted).

[67] *Id.* at 561–62.

[68] *Id.* at 554–55, 560.

[69] *Cf.* Schacter, *supra* note 10, at 462 (elucidating that neither the holding nor legal rationale of *Reynolds* pertain to a constitutional right to voter per se); *see* Paul J. Valentine, *People in Glass Houses Should Not Throw Stones: Why the Democracy Deficit Argument Against Intergovernmental International Organization Carries Little Weight in the United States of America*, 2 PHX. L. REV. 83, 93–94, 94 n. 57 (2009) (referring to the Court's "dicta" in *Reynolds* stating that there is a fundamental right to vote); José D. Román, *Trying to Fit an Oval Shaped Island into a Square Constitution: Arguments for Puerto Rican Statehood*, 29 FORDHAM URB. L.J. 1681, 1708 (2002) (opining that the *Reynolds* Court "reaffirmed the relative right to vote").

its holding with this ardent and broad-brush motif. Since I do not readily suspect Justices of the Supreme Court of a lack of intellectual discipline, there must be another reason. Could they have meant the dicta as a stratagem to obfuscate the shortfall of not identifying the right? If so, it has been effective; for, numbers of scholars have viewed *Reynolds* as establishing a fundamental constitutional right to vote per se.[70]

Similar dynamics are on display in *Harper v. Virginia Board of Elections*.[71] Like *Reynolds*, *Harper* was decided pursuant to the Fourteenth Amendment's Equal Protection Clause,[72] this time so as to strike down a poll tax, the payment of which Virginia had instituted as a prerequisite to voting in its state elections.[73] The legal rationale for the outcome was that the Clause forbids states from setting voter qualifications that discriminate on the basis of financial status in contravention of, again, some polysemous fundamental voting right;[74] the Justices appeared especially concerned about how a poll tax capriciously draws lines between those who can pay it and those who cannot.[75] As in *Reynolds*, the exact fundamental right which earned the *Harper* plaintiff strict scrutiny is glossed over.[76]

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[70] *See*, *e.g.*, Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 215 n. 9 (asserting that *Reynolds v. Sims* gave rise to a fundamental right to vote); Douglas, *supra* note 10, at 160 (intimating that *Reynolds v. Sims* "applied a fundamental rights rationale" with respect to voting rights); Paul Charton, *Frying Pan or Fire: Legal Fallout From the Contested 2000 Presidential Election*, 29 U. ARK. LITTLE ROCK L. REV. 669, 672 (2007) (averring that in *Reynolds v. Sims* the Court held that there is a fundamental right to vote); Panel Discussion, Am. Const. Soc'y, *Voter ID Laws: Preventing Fraud or Suppressing the Vote? A Panel Discussion Hosted by the American Constitution Society*, 13 GEO. PUB. POL'Y REV. 109, 111 (2008) [hereinafter Panel Discussion] (maintaining that *Reynolds v. Sims* ruled that the right to vote is fundamental); David Schultz, *Less than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 489 (2008) (claiming that the *Reynolds* decision declared the right to vote to be fundamental under the Constitution).

[71] Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665 (1966).

[72] U.S. CONST. amend. XIV, § 1.

[73] *Harper*, 383 U.S. at 666, 670.

[74] *Id.* at 667–70.

[75] *Id.* at 666, 668, 670.

[76] The *Harper* Justices do not identify the right in issue as a right to vote per se, a right to an equal vote, or an equal right to vote. Instead, the majority opinion

In my estimation, the right which is most attuned to the facts of the case and most closely complements this judicial preoccupation with even-handedness is a fundamental equal right to vote. That is the right integral to the plaintiff's claim for an equal opportunity to vote[77] and to the Court's holding.[78] The broader right to vote per se is outsized to the purpose of rendering the judgment.

Not all constitutional scholars agree with this assessment of the right in issue, and their standpoint is not without reason.[79] First, the majority opinion overtops itself in enthusiastically acclaiming the unadorned "right to vote."[80] Second, the *Harper* Justices faced the salient fact that enforcement of the poll tax would work a complete exclusion of a non-paying individual from voting.[81] That exclusion almost appears to beg for the remedy of an entitlement to vote per se.

It is stunning that not once but twice the Court has made a crucial right the stuff of guessing games.[82] While my colleagues who may have conflated *Harper*'s holding with its dicta do have a deal of cerebration on their side, what excuse did the Supreme Court have for leaving us in such straits?

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uses the phrases "the right to vote" and "the right of suffrage." *Id.* at 665, 667, 670.

[77] *Id.* at 665 n.1.

[78] *Id.* at 668, 670.

[79] *See, e.g.*, Franita Tolson, *Protecting Political Participation Through the Voter Qualification Clause of Article I*, 56 B.C. L. REV. 159, 161 n.5 (2015) (stating that the right to vote in federal elections is acknowledged in Harper v. Virginia Board of Elections); Schultz, *supra* note 70, at 487; Yael Bromberg, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 U. PA. J. CONST. L. 1105, 1155 (2019) (noting that a subsequent case "weakens the fundamental right to vote" respected by the Court in Harper v. Virginia Board of Elections); Robert C. Farrell, *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 ST. LOUIS U. PUB. L. REV. 203, 215 (2007) (commenting that the *Harper* case dealt with "an implied fundamental right to vote"); Ken Gormley, *Racial Mind-Games and Reapportionment: When Can Race Be Considered (Legitimately) in Redistricting?*, 4 U. PA. J. CONST. L. 735, 767 (2002) (claiming that the Court "had located the fundamental 'right to vote' in the folds of the Fourteenth Amendment, in . . . Harper v. Virginia State Board of Elections . . .").

[80] *Harper*, 383 U.S. at 670.

[81] *Id*. at 668 (describing *Harper* as turning on "a system which excludes those unable to pay a fee to vote").

[82] *See generally id.* at 663; Reynolds v. Sims, 377 U.S. 533, 554 (1964).

Of the three 1960s cases being examined in this Part, *Kramer v. Union Free School District No. 15*[83] may have come nearest to recognizing a fundamental constitutional right to vote per se.[84] But, incongruously, *Kramer* is still more baffling than *Reynolds* and *Harper* as precedent concerning the right. In *Kramer*, the plaintiff sued under the Equal Protection Clause[85] against his exclusion from voting in a school district election in the district where he resided.[86] His disqualification resulted because he did not meet eligibility requirements prescribed by a New York statute.[87] The statute made voting in these elections contingent upon a district resident being either: an owner or lessee of taxable real property in the district (or spouse of such a holder), or the parent or guardian of a child enrolled in a local public school.[88] *Kramer* therefore resembles *Harper* insofar as both cases revolve around a person who is entirely excluded by state legislation from exercising the franchise in certain elections.[89]

The *Kramer* Court ruled New York's law to be unconstitutional pursuant to strict scrutiny.[90] The majority opinion, as might now be expected, does not identify the type of voting right New York violated.[91] Nor does the opinion, in explaining why plaintiff's action properly sounded in equal protection, expend much ink comparing plaintiff's plight with that of eligible voters.[92] The Court appears instead to have been engrossed by the harms wrought when an individual is totally excluded from voting:

> "[A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." This . . . examination is necessary because

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83 395 U.S. 621 (1969).

84 *See infra* notes 85–98 and accompanying text.

85 U.S. CONST. amend. XIV, § 1.

86 *Kramer*, 395 U.S. at 622.

87 *Id*.

88 *Id*. at 622–23.

89 *See id.* at 622–23; Harper v. Va. State Bd. of Elections, 383 U.S. 663, 664 n.1 (1966).

90 *Kramer*, 395 U.S. at 622, 626–27, 633.

91 *See generally id*.

92 *See id.* at 625–26.

> statutes distributing the franchise constitute the foundation of our representative society.
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> . . . .
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> Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives.[93]

Indeed, it is these harms—to both a democratic society and to a person's voice in that society—that come across as impelling the *Kramer* Justices toward strict scrutiny. The methodology is consequently quite irregular; in the general run of equal protection cases, the Court uses strict scrutiny only if the challenged enactment impinges on a fundamental constitutional right or discriminates against a suspect class, [94] i.e., preconditions never established in *Kramer*.[95]

The majority opinion manages to seriously perplex, even though it is devoid of its predecessors' dicta paying homage to an unspecified fundamental right to vote.[96] The analytical mayhem on this occasion is traceable to the Court's focus on governmental exclusion of the individual from voting and the detriments caused thereby.[97] Albeit that this emphasis is perhaps wanly evocative of a fundamental right to vote per se, nowhere does the opinion actually say the Court is recognizing that or a different constitutional right.[98]

I suppose it is difficult in any context to reject a pronouncement that an authority figure repeatedly tells you to accept. When that figure is no less authoritative than the high Court regarding a matter of law, rejection may take some cheek. Or maybe not, seeing as the Court itself, paradoxically, has twice inadvertently corroborated this Article's interpretation of *Reynolds*, *Harper*, and *Kramer*. In the subsequent equal protection case of *San Antonio Independent School District v. Rodriguez*,[99] the Court stated, without temporizing

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93 *Id*. at 626–27 (citations omitted).

94 L. Info. Inst., *Strict Scrutiny*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/strict_scrutiny (last visited March 2, 2023).

95 *See generally Kramer*, 395 U.S. at 622–41.

96 *See supra* notes 85–95 and accompanying text.

97 *Kramer*, 395 U.S. at 626–33.

98 *See generally id.*

99 San Antonio Indep. Sch. Dist. V. Rodriguez, 411 U.S. 1 (1973).

or reservation, that "the right to vote, per se, is not a constitutionally protected right . . . ."[100] It is significant that that assertion figures into the case's holding. The appellees in *Rodriguez* had argued that a fundamental positive constitutional right to education implicitly flows from the constitutional right to vote, and it was in response to that contention that the Court made the statement.[101] Later, in *Bush v. Gore*,[102] the Court made a comparable declaration in dicta regarding presidential elections: "The individual citizen has no federal constitutional right to vote for electors for the President . . . unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college."[103]

In this context, the most that can be said about the trio of 1960s cases is that they have ambiguated the constitutional right to vote beyond ordinary human grasp and have simultaneously lauded the ambiguated right with prayerful eloquence. The one thing the Court has not done is to provide out-and-out recognition that a fundamental constitutional right to vote per se exists.

B. Burdick *and* Crawford

In *Burdick v. Takushi*,[104] a voter challenged, as a violation of the Equal Protection Clause[105] and the First Amendment right of association,[106] Hawaii's prohibition on write-in voting.[107] At the time of the suit, the state had a system providing access to the ballot until a cutoff date, two months before the primary, for filing nominating petitions.[108] The plaintiff claimed that the two-month period was an unconstitutional burden on his right to vote for his favorite candidate.[109]

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100 *Id.* at 35 n.78.
101 *Id*. at 35–36.
102 Bush v. Gore, 531 U.S. 98 (2000).
103 *Id.* at 104.
104 Burdick v. Takuski, 504 U.S. 428 (1992).
105 U.S. CONST. amend. XIV, § 1.
106 U.S. CONST. amend. I.
107 *Burdick*, 504 U.S. at 428, 430, 438.
108 *Id.* at 428, 435–37.
109 *Id*. at 432, 438.

The Court used a two-step process to reach a judgment.[110] First, the Justices evaluated the nature of the burden imposed by the time restriction on plaintiff's right to vote and concluded that the burden, being neutral, reasonable, and not severe, was "very limited."[111] Then, in a second step, they invoked a balancing test, i.e., that a burden so characterized will generally be upheld if justified by the state's legitimate regulatory interests.[112] (In this connection, the Justices also meditated that if the write-in prohibition had been a severe enough burden on the right to vote, then strict scrutiny would have been the appropriate test of constitutionality.[113])The Court sided with the state, ruling that the "slight" burden imposed by the write-in prohibition was justified by Hawaii's interest in avoiding too much factionalism at the general election.[114] Consequently, the *Burdick* holding amounts to this: when a government burden on the right to vote, such as the write-in ban, is neutral, reasonable, and not severe, the burden must usually be upheld if the government has absolving important regulatory interests for it, like controlling unbridled factionalism.[115] Of a piece with the 1960s precedents discussed in Part II, nowhere does the majority opinion give the slightest hint as to the kind of right to vote that Hawaii had reasonably burdened.[116]

The Court afterwards merged *Burdick's* two-step process into one in *Crawford v. Marion County Election Board*,[117] a plurality decision upholding Indiana's prerequisite of showing a government-issued photo identification in order to vote.[118] *Crawford* refused to adopt any "litmus test" for first "neatly separat[ing]" valid from invalid voting restrictions and only afterwards applying either the

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110 *Id.* at 434–41.
111 *Id*. at 437–39.
112 *Id*. at 439–41.
113 *Id*.
114 *Id*. at 439.
115 *Id*. at 441; *see* Max Stul Oppenheimer, *Return of the Poll Tax: Does Technological Progress Threaten 200 Years of Advances Toward Electoral Equality?*, 58 CATH. U. L. REV. 1027, 1046 (2009) (confirming that *Burdick* used a balancing test); Benson, *supra* note 10, at 15 (observing that the *Burdick* case adopted a flexible balancing approach).
116 *See generally Burdick*, 504 U.S. at 433–441.
117 Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).
118 *Id*. at 181, 188–89, 204.

balancing test or strict scrutiny.[119] Rather, the lead opinion opted for going straight to a sliding-scale balancing test where the challenged burden on voting is weighed against "the precise interests put forward by the State" to justify the burden.[120] Although the Court clarified that its new unitary approach would not preclude the use of strict scrutiny to assess the constitutionality of a severe burden, the *Crawford* decision created an initial presumption of nonseverity.[121] The presumption thereby incrementally moved the judiciary even farther away from recognizing a fundamental right to vote per se, though the lead opinion does not refer to that right or any other voting right in particular.[122]

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[119] *Id.* at 189–90.

[120] *Id.*

[121] *See* Christopher S. Elmendorf & Edward B. Foley, *Gatekeeping vs. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court*, 17 WM. & MARY BILL RTS. 507, 523–24 (2008) (enunciating that the *Crawford* lead opinion abandoned a two-tiered approach to assessing the constitutionality of the Indiana voter ID law); *cf*. Lisa Marshall Manheim & Elizabeth G. Porter, *supra* note 70, at 213, 229–31 (2018) (describing *Crawford* as having created an approach to burdens on voting that is overly deferential to government restrictions); Benson, *supra* note 10, at 16–17 (remarking on the *Crawford* lead opinion's deference to the state in assessing the burden on voting); Michael D. Gilbert, the *Problem of Voter Fraud*, 115 COLUM. L. REV. 739, 750–52 (2015) (declaring that the lead *Crawford* opinion went straight to a balancing test without really assessing the weight of the burden caused by a voter ID requirement).

[122] *See* Douglas, *supra* note 10, at 146 (opining that "instead of clarifying whether the right to vote is always fundamental, the Court in *Crawford* merely contributed to the confusion"); Mary Jo Lang, Note, *The Importance of Being Narrowly Tailored: A Call for Strict Scrutiny for a Fundamental Right in* Crawford v. Marion County Election Board, 128 S. Ct. 1610 (2008), 88 NEB. L. REV. 582, 611 (2010) (contending that the *Crawford* ruling "has the potential to compromise the fundamental right to vote"); Gary J. Simson, *Election Laws Disproportionately Disadvantaging Racial Minorities, and the Futility of Trying to Solve Today's Problems with Yesterday's Never Very Good Tools*, 70 EMORY L. J. 1143, 1147 n.12 (stating that *Crawford* neglected "to give the fundamental right to vote its due"). *But see* Thomas Basile, *Inventing the "Right to Vote" in* Crawford v. Marion County Election Board, 128 S. Ct. 1610, 32 HARV. J. L. & PUB. POL'Y 431, 431, 438 (2008) (referring to "the Court's latest examination of the scope of the right to vote" in *Crawford* and bemoaning that *Crawford* leaves open the door for further strengthening of the right).

C. Coda

The body of equal protection law discussed in Parts II.A and B is doctrinally confusing. That does not mean, though, that the Equal Protection Clause should be disqualified from serving as the basis for a fundamental constitutional right to vote per se. This author would rejoice in the Court's recognition of that right under the Equal Protection Clause, provided that the step is blatantly acknowledged and characterized with crystalline clarity. Doing so would not compel the Court to overturn prior holdings, run afoul of stare decisis, or engage in any other extraordinary maneuvers. At most, some further interpretation or explanation of precedents might be involved, a type of "remastering" the Court has not been adverse to in other contexts.[123] Nevertheless, given the difficulties which have attended the Court's past handling of the right to vote under equal protection principles, a productive course correction should also contemplate untried constitutional provisions that are arguably a cleaner fit with an aboveboard and authentic right to vote per se.

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[123] The Court's occasional "remastering" of its own precedents so as to bulldoze them into conformance with the Court's later cases is on display in the following example. Under the Fourteenth Amendment's Due Process Clause, the Court created the doctrine of selective incorporation under which certain rights in and stemming from the Bill of Rights were made applicable to the states. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONST. L.: SUBSTANCE & PROCEDURE § 15.6(a), at 855–56 (5th ed. 2012). In Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled on other grounds*, and Benton v. Maryland, 395 U.S. 784, 794 (1969), the Court held that incorporation should operate to enforce rights "so rooted in the traditions and conscience of our people as to be fundamental." This is not the modern standard that was subsequently announced in Duncan v. Louisiana, 392 U.S. 145, 148–49 (1968), which made incorporation contingent on whether a right was "fundamental to the American scheme of Justice." However, *Palko* is relevant to this "remastering" discussion because the Court effectively exported its outdated incorporation test into the different subject area of determining the fundamentalness of unenumerated substantive due process liberty rights. David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J.L. & PUB. POL'Y 795, 871–73 (1996); Robert C. Farrell, *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 ST. LOUIS PUB. L. REV. 203, 222–25 (2007).

III. DOCTRINAL FOUNDATIONS FOR RECOGNIZING A FUNDAMENTAL RIGHT TO VOTE PER SE IN OTHER CONSTITUTIONAL PROVISIONS

Since there is no express articulation of a fundamental constitutional right to vote per se in the Constitution, the Court needs to recognize the right by inference. As will be shown, the Constitution is rich with doctrinal foundations to bring this about.[124] Moreover, the Court has, over the years, frequently engaged in recognizing a profusion of various fundamental constitutional rights in this manner,[125] consistent with the Ninth Amendment's asseveration that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[126] Accordingly, here follows an exegesis of constitutional provisions from which a fundamental right to vote per se is inferable.

A. *Free Speech Clause*

At least one litigant has raised the Free Speech Clause[127] possibility with the Supreme Court. In *Harper v. Virginia State Board of Elections*,[128] the plaintiff maintained that the right to vote per se is implicit in both the Free Speech and Equal Protection Clauses.[129] The Court sidestepped addressing the free speech claim, rationalizing that "[w]e do not stop to canvass the relation between voting and political expression . . . [f]or it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are

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[124] *See infra* Sections III.A–G.

[125] Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 574 (1992); *see*, *e.g.*, Richmond Newspapers v. Virginia, 448 U.S. 555, 581 (1980) (holding that there is an implied right to an open criminal trial); Jackson v. Virginia, 443 U.S. 307, 334–35 (1979) (ruling that there is an implied right to a presumption of innocence and to demand proof beyond a reasonable doubt before being convicted of a crime); Meyer v. Nebraska, 262 U.S. 390, 401–03 (1920) (establishing the implied right to rear children in accordance with parental values and beliefs).

[126] U.S. CONST. amend. IX.

[127] U.S. CONST. amend. I.

[128] Harper v. Va. St. Bd. of Elections, 383 U.S. 663 (1966).

[129] *Id*. at 665.

inconsistent with the Equal Protection Clause."[130] The Court's silence on the free speech question left it open and it is open still today.[131]

It is interesting that forty-four years later, the Court upheld a very closely related right as rooted in this Clause. In *Citizens United v. Federal Election Commission*,[132] the Court entertained an action against, among other statutory provisions, section 441b(b) of the federal Bipartisan Campaign Reform Act of 2002, which mandated liability for corporations and labor unions if they used their general treasury funds to make independent expenditures expressly advocating the election or defeat of a candidate[133] or if they made electioneering communications within thirty days of a primary election and sixty days of a general election.[134] The Justices ruled that such expenditures constitute protected political speech,[135] a highly valued form of expression under the Constitution.[136] They expatiated that "[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people"[137] and, further, that the Clause "has its fullest and most urgent application to speech uttered during a campaign for political office."[138] On these grounds, the Court subjected section 441b(b) to strict scrutiny and struck the provision down.[139]

Citizens United may have unwittingly brought our jurisprudence much nearer to locating a fundamental right to vote per se within the Clause. Logically, if speech happening outside a voting booth but in furtherance of a political candidacy is of constitutional ilk because

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130 *Id*.
131 Derfner & Hebert, *supra* note 10, at 471, 481, 481 n.95.
132 Citizens United v. Fed. Election Comm'n 558 U.S. 310 (2010).
133 *Id.* at 318.
134 *Id*. at 321.
135 *Id*. at 354, 371.
136 *Id*. at 372 (Roberts, C.J., concurring).
137 *Id*. at 339 (majority opinion).
138 *Id*.
139 *Id*. at 340, 365, 372.

"it is the means to hold officials accountable to the people" in a democracy,[140] how can the right to vote per se be denied the same preferment?[141] Indeed, there is no stronger lawful way to ensure that that this accountability is preserved than by exercising the franchise.[142] In our system of government, politicians are keenly aware of this dynamic—that the people may "vote the bastards out" in the next election should the incumbents displease.[143]

But there is, I would hasten to add, an even more convincing argument for deciphering a fundamental right to vote per se in the Free Speech Clause. Voting *is* speech[144]—a "speech act," to be precise.[145] The Court, though not yet having elevated voting to a fun-

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[140] *Id*. at 339.

[141] *See* McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 191–92 (2014). Two commentators have highlighted the homogeneity between speech, including money payments for political purposes, and the exercise of the franchise:

> Ignoring the reality that voting is "expressive communication" contrasts with the strong First Amendment protection of money in politics. Isn't signing an absentee ballot and putting the stamped envelope in the mailbox as expressive as signing a check to a candidate or political committee and putting the stamped envelope in the mailbox?

Derfner & Hebert, *supra* note 10, at 489.

[142] "As Justice Holmes wrote of the First Amendment, the 'best test of truth is the power of thought to get itself accepted in the competition of the market,' and there can be no better 'test' than the canvass of votes casts by voters." Derfner & Hebert, *supra* note 10, at 489 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

[143] Ilya Somin, *Transcripts: Democracy, Foot Voting, and the Case for Limiting Federal Power*, 76 MONT. L. REV. 21, 30 (2015).

[144] *See* Derfner & Hebert, *supra* note 10, at 471–72; Adam Winkler, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 331 (1993).

[145] The phrase is also used in Professors Derfner's and Hebert's seminal article to characterize what voting is. Derfner & Hebert, *supra* note 10, at 472; *see also* Adrienne Stone & Frederick Schauer, THE OXFORD HANDBOOK OF FREEDOM OF SPEECH 461 (2021) (defining "speech acts" as "speech which is used to perform acts such as requests, warnings, invitations, promises, apologies, and so on"). It should be clarified that this Article concerns voting as the speech act of each individual person. Hence, the Article does not consider voting as an exercise of the implied Free Speech Clause right of expressive association. Some other commentators have found a link between suffrage and that right. *See* Storer v. Brown, 415 U.S. 724, 756 (1974) (Brennan, J., dissenting) (positing that "[t]he right to vote derives from the right of association that is at the core of the First Amendment");

damental right under the Free Speech Clause, has ad infinitum recurred to the unavoidable admission that voting gives citizens a "voice" in American democracy.[146] Whatever else voting may be, it is the expression of a person's political penchants vis-à-vis candidates for elected office or proposals subject to referendum. Even more primally, voting is an expressive dimension of selfhood—of the whole range of psychological and intellectual attributes that go into comprising a person's political views.[147]

Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CALIF. L. REV. 1209, 1255–60 (2003) (alleging that there is protection for voting in the First Amendment's right of association).

[146] *See*, *e.g.*, Clingman v. Beaver, 544 U.S. 581, 599 (2005); Miller v. Johnson, 515 U.S. 900, 932 (1995); Shaw v. Reno, 509 U.S. 630, 675 (1993) (White, J., dissenting); U.S. Dep't of Com. v. Montana, 503 U.S. 442, 460 (1992); Burdick v. Takushi, 504 U.S. 428, 441 (1992); Burson v. Freeman, 504 U.S. 191, 199 (1992); Chisom v. Roemer, 501 U.S. 380, 398 n.25 (1991); Bd. of Estimate of City of N.Y. v. Morris, 489 U.S. 688, 693 (1989); Davis v. Bandemer, 478 U.S. 109, 166 (1986) (Powell, J., concurring in part and dissenting in part); Rogers v. Lodge, 458 U.S. 613, 649 (1982) (Stevens, J., dissenting); Ball v. James, 451 U.S. 355, 371 (1981); Democratic Party of U.S. v. Wisconsin *ex rel*. La Follette, 450 U.S. 107, 127, 134 n.11 (1981); City of Rome v. United States, 446 U.S. 156, 201 (1980) (Powell, J., dissenting); City of Mobile v. Bolden, 446 U.S. 55, 78 (1980); Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 76 (1978); United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 177 n.5 (1977); City of Richmond v. United States, 422 U.S. 358, 387–88 (1975); Am. Party of Tex. v. White, 415 U.S. 767, 799 (1974); Kusper v. Pontikes, 414 U.S. 51, 58 (1973); Rosario v. Rockefeller, 410 U.S. 752, 764 (1973); Mahan v. Howell, 410 U.S. 315, 321, 323 (1973); Jenness v. Forston, 403 U.S. 431, 442 (1971); Whitcomb v. Chavis, 403 U.S. 124, 141 (1971); Oregon v. Mitchell, 400 U.S. 112, 134 (1970); Evans v. Cornman, 398 U.S. 419, 422 (1970); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969); Hadnott v. Amos, 393 U.S. 904, 906 (1968); Williams v. Rhodes, 393 U.S. 23, 31 (1968); Avery v. Midland Cnty., 390 U.S. 474, 480 (1968); Carrington v. Rash, 380 U.S. 89, 93 (1965); Fortson v. Toombs, 379 U.S. 621, 626 (1965) (Harlan, J., concurring in part and dissenting in part); Roman v. Sincock, 377 U.S. 695, 711 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633, 655 (1964); Reynolds v. Sims, 377 U.S. 533, 576 (1964); Wesberry v. Sanders, 376 U.S. 1, 10, 17 (1964); Gray v. Sanders, 372 U.S. 368, 386 (1963). This is not an exhaustive list.

[147] Munsey, *supra* note 4; PENNOCK, *supra* note 4, at 32; *see* Douglas, *supra* note 10, at 149 (averring that "voting represents the epitome of self-governance"); Gregg Strauss, *The Positive Right to Marry*, 102 VA. L. REV. 1691, 1709 (2016) (declaring that voting is the exercise of autonomy).

Thus, there is a preeminence to voting among all other personal political messaging, if not among all speech altogether.[148] It is anomalous that the Court has conferred most protected status, under the Free Speech Clause, on a smorgasbord of messaging the content of which seems less weighty or deserving than voting, e.g., hate speech and non-obscene adult pornography, to name just two.[149] Within the Clause's hierarchies of speech, voting is a nonpareil and should receive the most solicitous constitutional protection. Judicial recognition of a fundamental free speech right to vote per se would achieve that goal.

B. *Petitions Clause*

The First Amendment's Petitions Clause states that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for redress of grievances."[150] "Petitions are a form of expression" and plaintiffs who invoke the Petitions Clause in most cases could have just as easily relied upon the Free Speech Clause of the First Amendment.[151] Petitioning is also celebrated for figuring prominently "on matters of public concern"[152] during some of the nation's most charged political and legal debates, both at the beginning of the republic and later.[153]

Though the Petitions Clause has in recent times been largely neglected by the professoriate,[154] the Court appears to have been of a different mind. Not so very long ago—in 2011—the Justices decided *Borough of Duryea v. Guarnieri* which hails the right to petition as a source of other fundamental constitutional rights and even

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[148] Williams v. Rhodes, 292 U.S. 23, 31 (1968).

[149] Regarding the protected status that hate speech has earned under the Free Speech Clause, see R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992). Regarding the protected status of non-obscene adult pornography, see HENRY COHEN, OBSCENITY AND INDECENCY: CONSTITUTIONAL PRINCIPLES AND FEDERAL STATUTES 1–2 (2003); ROBERT A. SEDLER, CONSTITUTIONAL LAW IN THE UNITED STATES 175 (3rd ed. 2017).

[150] U.S. CONST. amend. I.

[151] Borough of Duryea v. Guarnieri, 564 U.S. 379, 382 (2011).

[152] *Id*. at 396.

[153] *Id*. at 396–97.

[154] My search on Westlaw for law review articles involving the Petitions Clause yielded only seventeen articles, none of which are relevant to this Article.

as a "vital means" for seeking recognition of new ones.[155] By the Court's lights, then, the Clause is no uninteresting scrap of vellum from eras past and done with; it is instead a provision of uncabined potential in growing the Constitution through development of underivative rights.[156]

The foregoing raises the question of whether the Petitions Clause could become the constitutional mainspring of a fundamental right to vote per se.[157] There are at least three jurisprudential reasons for summoning the Clause to this purpose. First, it bears repeating that the Court has declared the Clause competent to engender new constitutional rights.[158] No caveats were attached.[159] Second, the Court has praised the Clause's long history as a tool of choice in the pursuit of democratic governance.[160] Third, and incidental to such governance, the Court has memorialized the Clause's leading role in securing the right to vote for omitted groups.[161]

I have lifted the three reasons from *Guarnieri* dicta[162] that, *qua* dicta, are unusually intriguing. Inasmuch as there is a paucity of contemporary Supreme Court decisions on the Petitions Clause,[163] the *Guarnieri* pronouncements are nearly unanswerable in deconstructing the Clause for twenty-first century sensibilities and concerns.[164]

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155 *Guarnieri*, 564 U.S. at 397.

156 *Id.*

157 The proposal to situate a fundamental right to vote per se in the Petitions Clause was initially advanced in Derfner & Hebert, *supra* note 10, at 472 n.6.

158 *Guarnieri*, 564 U.S. at 397.

159 *See id*.

160 *See id*.

161 *Id*. at 396–97.

162 The *Guarnieri* action was brought by a police chief on the theory that his rights under the Petitions Clause were violated by his municipal employer when it (1) instructed him on how to perform his duties after he had been reinstated pursuant to a grievance proceeding, and (2) denied his request for overtime pay. *Id.* at 383–84. The Court held for defendant. *Id*. at 399.

Clearly, the Court's discourse detailing the generalized history and meaning of the Petitions Clause was not integrated into the Court's holding.

163 Emily Calhoun, *Initiative Reforms and the First Amendment*, 66 U. COLO. L. REV. 129, 133 (1995).

164 *See* Marissa C.M. Doran, *Lawsuits as Information: Prisons, Courts, and a Troika Model of Petition Harms*, 122 YALE L.J. 1024, 1076 n.258 (2013). ("The contemporary generation of petition cases had embodied unclarity about the relationship between petition and speech, such that the *Guarnieri* Court had an opportunity to push petition jurisprudence either toward speech or away from it.

Moreover, the Court's reading of the Clause should draw interest from across the current ideological and political spectrums. Perhaps originalists may find comfort in *Guarnieri*'s emphasis on the use and understanding of petitioning going back to as far as the Magna Carta;[165] noninterpretevists may likewise find comfort in analyzing the Petitions Clause as invitational,[166] i.e., inviting the judiciary to exploit the Clause as a medium for recognizing unenumerated fundamental constitutional rights. In an age of political polarization, including within the American legal community, this could be a latent "it-clause" for establishing a fundamental constitutional right to vote per se.

C. *Substantive Due Process*

I wager that substantive due process is not intuitively the first doctrine one might think of as a potential home for a fundamental constitutional right to vote per se. There are, in fact, no Supreme Court cases and scant academic literature dealing with the possibility.[167] Nevertheless, I will show in this Part that the right to vote per se comports with the Court's criteria for categorizing rights as fundamental under the substantive aspect of the Due Process Clauses of the Fifth and Fourteenth Amendments.[168]

The category of substantive due process relevant to this Article stems from judicial recognition of unenumerated rights arising from the Clauses' textual protection of liberty.[169] The way substantive due

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The opinion seems to have been aware of at least some contemporary scholarship suggesting that the rights be disaggregated, but the holding reified, albeit cautiously and only in the employment context, the practice of aggregation.").

[165] *Guarnieri*, 564 U.S. at 395.

[166] *See* WILLIAM A. KAPLIN, AMERICAN CONSTITUTIONAL LAW: AN OVERVIEW, ANALYSIS, AND INTEGRATION 232 (2004) (using the term "invitational" to describe certain constitutional clauses giving rise to implicit meanings).

[167] My research has revealed no Supreme Court cases or scholarly articles of value arguing for a fundamental substantive due process right to vote per se.

[168] U.S. CONST. amends. V, XIV, § 1.

[169] *See* Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 164 n.21 (2006) (suggesting that there is a "public meaning" supporting the Court's "unenumerated rights jurisprudence" flowing from the Due Process Clauses); Bitensky, *supra* note 126, at 579–96 (detailing the development of the Court's substantive due process analysis giving rise to fundamental unenumerated rights); JAMES E. FLEMING, CONSTRUCTING BASIC

process works is that if a plaintiff can successfully show that one of these rights is fundamental and is being impinged by the challenged legislation, then the court will apply some form of heightened scrutiny.[170]

The Court's most recent doctrinal approach to gauging this fundamentalness was enunciated in *Washington v. Glucksberg*[171]: unenumerated fundamental substantive due process rights are those "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[172] The Justices have elsewhere stated that, to be pertinent to the analysis, there must be a tradition embracing or repudiating the right.[173] Repudiation of a right may mean that the tradition embraces the opposite of the right.[174] It should be noted that the Court has not, as a doctrinal matter, demanded that a tradition be entirely unbroken in order for it to count in assessing fundamentalness;[175] instead, the Court has accepted some discontinuity.[176] The Court has also indicated that such a tradition need not be exactly replicative of an asserted right's

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LIBERTIES: A DEFENSE OF SUBSTANTIVE DUE PROCESS 3–4, 20–21 (2022) (describing and defending modern substantive due process doctrine as a source of fundamental unenumerated rights); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2246 (2022) (referring to the substantive due process doctrine comprising "a select list of fundamental rights not mentioned anywhere in the Constitution").

170 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONST. L.: SUBSTANCE & PROCEDURE § 15.6(a), at 865 (5th ed. 2012). .

171 Washington v. Glucksberg, 521 U.S. 702 (1997).

172 *Id.* at 721.

173 Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion) (specifying that a relevant tradition is one "protecting, or denying protection to, the asserted right").

174 *See, e.g.*, *Dobbs*, 142 S. Ct. at 2251–53 (2022) (ruling that neither American history nor tradition protect the right to abortion because, during the nineteenth century, most states criminalized abortion).

175 *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 659–63, 669 (2015) (investigating the nation's changing attitudes toward homosexuality and same-sex marriage).

176 *Id.* at 659–60. Incidentally, although America's tradition against a right to abortion was characterized as unbroken in *Dobbs*, the majority opinion in that case did not insist on continuity as a doctrinal matter. *Dobbs*, 142 S. Ct. at 2251–54 (2022).

contents in order for the right to be deeply rooted in the tradition.[177] Finally, there is a judicially prescribed shortcut available in the hunt for tradition: an asserted right may be implied in another constitutional right that the Court has already recognized as fundamental.[178] Under these circumstances, it is the process of implication which makes the asserted right deeply rooted enough to be deemed fundamental.[179]

What do these principles bode for whether there is a fundamental substantive due process right to vote per se? Trying the shortcut, it bears reiterating that voting is an exercise of each voter's personal autonomy.[180] When a person votes on a candidate or proposed government policy, it is a choice as to how the person wants to be governed.[181] It is a fateful and intensely personal decision which may have far-reaching ramifications for the individual voter and his or her loved ones.[182] Decision-making of this ilk may influence the most granular details of people's daily routines and overarching life trajectories for years to come.[183]

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[177] *See id.* at 665–72, 675–76 (2015) (holding that the fundamental substantive due process right to same-sex marriage is a part of the fundamental substantive due process right to marry which had previously only applied to heterosexual couples); *see also* Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 633 (1992) (recounting that the fundamental substantive due process right to privacy "includes the right to possess and use contraceptives . . . [and] the right to choose family living arrangements," among other rights); ROTUNDA & NOWAK, *supra* note 170, at 875–76 (averring that there is a fundamental substantive due process right to privacy which "has been held to include rights to freedom of choice in marital decisions, child bearing, and child rearing").

[178] *See Dobbs*, 142 S. Ct. at 2257–58.

[179] *See Obergefell*, 576 U.S. at 665–72, 675–76; Galloway, Jr., *supra* note 177, at 633; ROTUNDA & NOWAK, *supra* note 170, at 875–76; *see also Dobbs*, 142 S. Ct. at 2244, 2257–58 (articulating that one acceptable methodology for recognizing a fundamental substantive due process right is to discern whether the right is implicit in another fundamental substantive due process right previously established by the Court).

[180] *See* Strauss, *supra* note 147, at 1709.

[181] *See* Douglas, *supra* note 10, at 81 ("When a group of citizens collectively elects its representatives, it affirms the notion that we govern ourselves by free choice.").

[182] *See generally Dobbs*, 142 S. Ct. at 2284; *Obergefell*, 576, U.S. at 681.

[183] *See supra* notes 175–77 and accompanying text.

Supreme Court precedents on fundamental substantive due process rights, i.e., so-called privacy rights, substantially parallel the autonomy interests at stake in voting.[184] The Court has repeatedly found that the privacy rubric subsumes various types of freedom of choice in shaping how people want to conduct their lives and cultivate their personal identities.[185] As such, the Court has held that there are fundamental substantive due process privacy rights to marry,[186] to procreate or use contraception,[187] and to live together with ones relatives in a single domicile.[188] This is not a closed-set list.[189]

The physical mechanics of casting a vote are quite different than the activities involved in exercising due process privacy rights.[190] However, in terms of underlying basic values or aspirations, the right to vote per se and the recognized rights are of the same stamp. They all represent personal autonomy of choice as to one's life plan.[191] Ergo, the shortcut analysis yields a clear, crisp yes regarding the voting right's possible designation as a fundamental substantive due process right.[192]

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[184] *See* Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 485–86 (2002).

[185] *See* ROTUNDA & NOWAK, *supra* note 170, § 15.7, at 875–76, 876 n.37; *see also id*.

[186] Loving v. Virginia, 388 U.S. 1, 12 (1967).

[187] *See* ROTUNDA & NOWAK, *supra* note 170, § 15.7, at 875–76, 876 n.37 (observing that fundamental constitutional rights concerning "child bearing" involve "several particular rights or freedoms" including under substantive due process).

[188] Moore v. City of East Cleveland, 431 U.S. 494, 503–05 (1977) (plurality opinion).

[189] Naturally, there is no way of knowing what new substantive due process rights the Court may recognize in the future, though certainly Justice Thomas is dead set against all fundamental unenumerated substantive due process rights. *See* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2300–04 (Thomas, J., concurring).

[190] For example, pulling the lever in a voting booth to choose a candidate for political office does not, at first glance, look much like marrying or living together with one's relatives in a single domicile—two recognized fundamental substantive due process rights. *See Moore*, 431 U.S. at 505.

[191] *See* ROTUNDA & NOWAK, *supra* note 170, § 15.7, at 875–76, 876 n.37.

[192] *See id.* at 874. Professors Nowak and Rotunda assert that the right to vote is *already* a fundamental substantive due process right. *See also* Karlan, *supra* note 184, at 477–80 (2002) (arguing that the *Harper* case supports the de facto conclusion that there is a fundamental substantive due process right to vote).

In what is probably an excess of thoroughness, I also consider the alternative analytical route to fundamentalness by searching for American tradition in relation to the right to vote per se. It will be recalled that the 1787 Constitution is mute as to who can vote in government elections;[193] voting was not even mentioned until the adoption of the Fourteenth Amendment in 1868.[194] Meanwhile, between 1787 and 1869, the states presented a montage of disparate laws going every which way protecting or restricting voting rights.[195]

After the Civil War, the federal government began to show a decided inclination toward protection of the voting rights of discrete cohorts of the population.[196] The trend began with the adoption in 1870 of the Fifteenth Amendment mandating that the right of citizens to vote "shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[197] As canvassed in Part I of this Article, over the course of the nineteenth and twentieth centuries, different versions of the fundamental equal right to vote were further expressly established in the Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments to the Constitution.[198] These developments were augmented by a line of Supreme Court decisions recognizing an implied fundamental right to an equally weighted vote under the Fourteenth Amendment's Equal Protection Clause.[199]

While an equal right to vote and the right to an equal vote are not the same as the right to vote per se, it is not an overstatement to say that the three are in some degree akin—to the point that some legal scholars and much of the public have mistaken the former two for the third.[200] The kinship is put on full display if you ask yourself

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193 *See* U.S. CONST. art. I, § 3.

194 *See* U.S. CONST. amend. XIV.

195 ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 257–59 (2000); Renalia DuBose, *Voter Suppression: A Recent Phenomenon or an American Legacy?*, 59 U. BALT. L. REV. 245, 257–58 (2021).

196 *See* U.S. CONST. Amend. XV.

197 *Id.*

198 *See* U.S. CONST. amends. XIX, XXIV, XXVI.

199 *See* Reynolds v. Sims, 377 U.S. 533, 560 (1964).

200 *See supra* note 79 and accompanying text.

how many people would be left to vote under an intolerably repressive government that violated, all of the time, all of the foregoing constitutional protections of equality in voting. Consider that, in this hypothetical, no people of color,[201] women,[202] eighteen-year-olds,[203] or indigent people[204] would be able to vote. I pose the rhetorical question, not for the purpose of discovering the right to vote per se lurking extant in those constitutional protections, but, rather, to illustrate how encompassing the tradition of protecting voting has been.

It is fair, I think, to extrapolate from all this that, at the highest level of American law, these constitutional amendments synthesize into an eminent and longstanding tradition embracing the right to vote for a huge proportion of the citizenry.[205] Moreover, the amendments have been supplemented through the years by a succession of federal statutes protective of the voting rights of various groups.[206] Thus, the overall trajectory of promoting nondiscriminatory voting has held, in spite of some front-page backsliding.[207]

Since the last presidential election, and in contrast to the federal tradition of generally protecting suffrage for over 150 years, the nation has recently been beset by some startling controversies over

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[201] U.S. CONST. amend. XV, § 1 (protecting against abridging the right to vote on the basis of race).

[202] U.S. CONST. amend. XIX (protecting against abridging the right to vote on the basis of sex).

[203] U.S. CONST. amend. XXVI, § 1 (protecting against abridging the right to vote on the basis of being eighteen years of age or older).

[204] *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666–67, 670 (1966) (striking down a Virginia poll tax as unconstitutional under the Equal Protection Clause).

[205] *See generally* U.S. CONST. amends. XV, § 1, XIX, XXVI, § 1.

[206] Congress has enacted the Civil Rights Act of 1870 (amended three times), the Voting Rights Act of 1965, the Voting Accessibility for the Elderly and Handicapped of 1984, the Uniformed and Overseas Citizens Absentee Voting Act of 1986, the National Voter Registration Act of 1993, the Help America Vote Act of 2002, and the Military and Overseas Voting Empowerment Act of 2009. *Voting and Election Laws*, USA.GOV, https://www.usa.gov/voting-laws (last visited Jan. 19, 2023).

[207] *See* Shelby County v. Holder, 570 U.S. 529, 557 (2013) (invalidating the coverage formula, used by the Voting Rights Act of 1965, as the criteria for subjecting jurisdictions to preclearance when they impose changes to state election laws).

voting.[208] On the one hand, a prodigious number of state legislatures have enacted laws which make voting a more burdensome task.[209] On the other hand, a vociferous hue and cry has gone up against these restrictions, with protesters seeking preemptive federal enactments to maintain and/or improve the franchise's accessibility and fairness.[210] The takebacks raise the question of whether our polarized politics are initiating in the states a new tradition opposing protection of the vote. But, even if this was the case, such a tradition is too embryonic and localized to counter the prolonged overarching federal legal tradition creditably safeguarding so many suffrage rights.[211]

All things considered, substantive due process jurisprudence, at this juncture and as currently devised, has created workable constitutional quarters for the fundamental right to vote per se.[212] The precedents recognizing the panoply of fundamental substantive due process rights, assuring aspects of pursuing fuller selfhood, almost seem to beckon for the addition of this one without which the Due Process Clause guarantee of liberty must fall short.[213] For, how else, except by voting, is a person to weigh in on who he or she wants to be and on how to live within the immense sprawl and farrago of contemporary American society?

D. *Privileges or Immunities Clause*

The Privileges or Immunities Clause of the Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[214] The Clause has had an aberrational and inglorious history.[215] Right out of the gate, in 1872, things got off to a really

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[208] *See, e.g.*, *Capital Riots Timeline: What Happened on 6 January 2021?*, BBC (Jun. 10, 2022), https://www.bbc.com/news/world-us-canada-56004916.

[209] *Voting Laws Roundup: February 2022,* BRENNAN CTR. FOR JUSTICE (Feb. 9, 2022), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2022.

[210] Epstein & Corasaniti, *supra* note 17.

[211] *See id.*

[212] *See supra* note 169 and accompanying text.

[213] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967).

[214] U.S. CONST. amend. XIV, § 1.

[215] *See* Slaughter-House Cases, 83 U.S. 36 (1873).

bad start as the Court effectively read the Clause out of the Constitution via the *Slaughter-House Cases*.[216]

In *Slaughter-House*, the Court upheld Louisiana legislation establishing a slaughterhouse monopoly against a butchers' association contention that the monopoly interfered with, among other things, the right to carry on a lawful trade protected by the Clause.[217] The majority opinion interpreted the Clause to relieve states of any duty to respect rights uniquely inhering in federal citizenship, i.e., the rights comprising "the privileges or immunities of citizens of the United States."[218] It was left to states to safeguard the rights of state citizenship which, the Justices said, are outside the Clause's purview.[219] Inasmuch as the Court ruled that engaging in a trade is a right of state citizenship,[220] invocation of the Clause to enforce the butchers' sought-after federal right to pursue a vocation, was of no use.[221]

What deprived the Clause of any further use to anybody anywhere was that the Court, in administering the final deathblow, shrank the category of rights uniquely inhering in federal citizenship to a puny few.[222] This situation basically continued for the next one hundred and twenty-seven years.[223] Then, suddenly in 1999, the Court seemed to jump-start the Clause by inferring from its words, in combination with the Fourteenth Amendment's Citizenship Clause,[224] a fundamental right to immigrate interstate.[225] It was a

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216 *Id.* at 78–83.
217 *Id*. at 59.
218 *Id*. at 74–75.
219 *Id*. at 75–77.
220 *Id*. at 77–78.
221 *Id*.
222 *Id*. at 79–80.
223 I use the word "basically" in the text above because the Court later added a handful of redundant federal rights to the *Slaughter-House* list. *See*, *e.g.*, Twining v. New Jersey, 211 U.S. 78, 97 (1908), *overruled on other grounds by* Malloy v. Hogan, 378 U.S. 1, 6 (1964) (recognizing among the "rights and privileges" of national citizenship certain rights already guaranteed by other laws, e.g., the right to petition Congress for a redress of grievances and the right to inform federal authorities of contravention of federal laws, among a few others). Because they were reiterations of existing rights, the additional ones were of minor import.
224 U.S. Const. amend. XIV, § 1.
225 Saenz v. Roe, 526 U.S. 489, 501–05 (1999).

jaw-dropping moment. However, the latter decision may, after all, have been just a flash in the pan inasmuch as the Court has done nothing else to unkill the Clause.[226]

It is an extreme thing for the Supreme Court to, in effect, have excised any provision explicitly set forth in our country's foundational law.[227] It is almost as peculiar for the Court to have then revived that provision so many years later for a single isolated purpose.[228] The *Slaughter-House Cases'* initial deletion of the Privileges or Immunities Clause probably was inspired by the doctrine of dual federalism,[229] itself a phenomenon with roots in slavery and the persistent racism against African-Americans that followed the Emancipation Proclamation.[230] Dual federalism posited that the

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[226] McDonald v. City of Chicago, 561 U.S. 742, 758 (2010) ("[W]e therefore decline to disturb the Slaughter-House holding.").

[227] *Slaughter-House Cases*, 83 U.S. at 75.

[228] *Saenz*, 526 U.S. at 501–05.

[229] *See* Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 HARV. L. & POL'Y REV. 33, 37 (2009) (describing dual federalism in nineteenth century America as a governing system where "spheres of state and national authority were exclusive and non-overlapping"); Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L. J. 1673, 1679 (2011) (referring to past dual federalism as the strict, static bifurcation of governing authority as between the federal government and the states); Logan E. Sawyer III, *Creating Hammer v. Dagenhart*, 21 WM. & MARY BILL RTS. J. 67, 71 (2012) (discussing that, historically, dual federalism meant that the federal government and states operated in "mutually exclusive spheres").

[230] The Emancipation Proclamation, issued on January 1, 1863, by President Abraham Lincoln, declared that "all persons held as slaves" within the rebellious areas "are, and henceforward shall be free." EMANCIPATION PROCLAMATION, NATIONAL ARCHIVES (Jan. 1, 1863), https://www.archives.gov/milestone-documents/emancipation-proclamation. *See* BALLARD C. CAMPBELL, THE GROWTH OF AMERICAN GOVERNMENT: GOVERNANCE FROM THE CLEVELAND ERA TO THE PRESENT 33 (2d ed. 2014) (concluding that in Plessy v. Ferguson, for one, the Court "elevated the principle of dual federalism above the denial of equality," thereby helping racism to remain legal in the United States); MARK J. ROZELL, AMERICAN POLITICAL CULTURE: AN ENCYCLOPEDIA 436 (Michael Shally-Jensen et al. eds., 2015). (mentioning that dual federalism contributed to maintenance of racially segregated facilities); *cf.* James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right To Vote: Shelby County v. Holder*, 8 HARV. L. & POL'Y REV. 39, 41, 54–56 (2014) (intimating that the dual federalism visible in the *Slaughter-House Cases* contributed to the racism of that era).

U.S. Constitution governs the rights of national citizenship, that state constitutions govern the rights of state citizenship, and that never the twain shall meet.[231] *Slaughter-House*, having bought the doctrine, underlined that most rights were exclusively intrinsic to state citizenship.[232] Though it is logical to expect dual federalism to have held sway before 1865, *Slaughter-House* manifests that even the post-bellum Court clung to this way of thinking.[233] In Professors James Blacksher and Lani Guinier's view, *Slaughter-House*'s nullification of the Privileges or Immunitipes Clause was actually a judicial stratagem to preclude black citizens from enjoying a constitutional right to vote.[234]

Undeterred by severe judicial containment, the legal academy has long seen promise in the Clause as a home for an assortment of unenumerated fundamental constitutional rights besides the lone right to immigrate interstate.[235] An early proponent of this interpretation is Professor Philip Kurland who theorized that the Clause is immanently serviceable in making the Constitution responsive to the "existent and potential needs" of a modern society bristling with threats to individual choice and privacy.[236] In a thought experiment of sorts, he imagined the Clause as a bulwark against such threats

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231 *Slaughter-House Cases*, 83 U.S. at 74–75.

232 *See Slaughter-House Cases*, 83 U.S. at 74–75, 77–78.

233 *Id.*

234 *See* Blacksher & Guinier, *supra* note 230, at 54–56.

235 *See, e.g.*, *id.* at 67–68 (opining that "an affirmative constitutional right to vote already exists in the Privileges and Immunities Clause," which "has been hiding in plain sight for a century and a half"); Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 WASH. U. L. REV. 405, 419 (conceptualizing the Privileges or Immunities Clause as having potential to house fundamental rights to "a myriad of . . . goods and services of which the government . . . has control directly or indirectly); Douglas G. Smith, *A Return to First Principles? Saenz v. Roe and the Privileges or Immunities Clause*, 2000 UTAH L. REV. 305, 321 (proposing that the Privileges or Immunities Clause should supplant the Fourteenth Amendment's Due Process Clause so as to become the primary source of unenumerated fundamental constitutional rights); Akhil Reed Amar & Jed Rubenfeld, *A Dialogue*, 115 YALE L. J. 2015, 2022, 2026, 2033 (2006) (contending that the language of the Privileges or Immunities Clause suggests the right to vote); M. Akram Faizer, *The Privileges or Immunities Clause: A Potential Cure for the Trump Phenomenon*, 121 PENN. STATE L. REV. 61, 84 (2016) (observing that the Privileges or Immunities Clause should protect the rights to vote and to quality education, among others).

236 *See* Kurland, *supra* note 235, at 418–20.

emanating, in his estimation, mostly from big government.[237] He saw the Clause as "an empty and unused vessel which affords the Court full opportunity to determine its contents" with rights to health care and the like.[238] Though Professor Kurland did not raise suffrage as one of those envisioned rights, his reasoning strongly supports it. For example, health care in our country may be sought from both governmental and nongovernmental sources, while voting for officials and on referendums is an interaction engaged in with government.[239] Hence, the presence and monopoly of government, with which Professor Kurland was primarily concerned, looms even larger over voting. Voting, involving secrecy[240] and personal choice of possibly tectonic proportions,[241] is consequently a letter-perfect fit with Kurland's take on the Clause.

A good number of contemporary scholars have, in fact, unequivocally placed the fundamental right to vote per se squarely in the Clause.[242] Professor Jed Rubenfeld has observed that, the right to vote is "the quintessential right of citizenship"—as "citizenship" is now commonly understood and used in the Clause.[243] The right is, according to Professors Blacksher and Guinier, so thoroughly congruent with the Clause's language that it "has been hiding in plain sight for a century and a half," concealed by judicial antipathy to enfranchising blacks and women, among others.[244] This was, by the way, an antipathy that may also have been exacerbated by awareness of Congress's power under Section 5 of the Fourteenth Amendment to legislatively enforce the Amendment's Section 1

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237 *See id*. at 418–19.

238 *See id*. at 420.

239 *See supra* note 5 and accompanying text; *infra* notes 344–46 and accompanying text.

240 "Since [the secret ballot's] adoption [in the late 1800s], with the exception of some party nominating caucuses, the secret ballot has been used in all federal and state elections of government officials." Conor M. Dowling et al., *The Voting Experience and Beliefs About Ballot Secrecy*, PLOS ONE 3 (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6322754/pdf/pone.0209765.pdf.

241 *See id.* at 5.

242 *See*, *e.g.*, Blacksher & Guinier, *supra* note 230, at 67–68; Amar & Rubenfeld, *supra* note 235, at 2026–27.

243 *See* Amar & Rubenfeld, *supra* note 235, at 2026.

244 *See* Blacksher & Guinier, *supra* note 230, at 68.

rights, including those coming within the ambit of the Privileges or Immunities Clause.[245]

It is doubtful that the original intent behind the Clause was to have it decimated by the judiciary. It is time for the Court to give back what it took from us in *Slaughter-House*. What better way to begin the process of restitution than for the Court to recognize a fundamental right to vote per se as emanating from the Privileges or Immunities Clause? It would be no minor side effect that recognition might also contribute to rectifying our country's history of suppressing the Clause in order, at least in part, to suppress the votes of some of our most sinned-against citizens.

E. *Structural Argument*

The Constitution does not exist for itself. Nor does the Constitution primarily exist for the governmental entities and their interrelationships which it authorizes. Rather, the constitutional enterprise and edifice exist primarily for the benefit of the people of the United States.[246] The federalism instituted via the Constitution is not so much a boon to the states as it is a mechanism to protect the people from the tyranny of concentrated power.[247] Separation of powers is not so much for the greater good of the federal government as it is, again, a device to avoid that concentration of power

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[245] *See id*. at 41–42.

[246] *See* Elizabeth Anne Reese, *Or to the People: Popular Sovereignty and the Power to Choose a Government*, 39 CARDOZO L. REV. 2051, 2053 (2018) (explaining that the people of the United States, as reflected in the Preamble's "We the People," devised and are superior to both American government and law); W. West Allen, *The Constitution United Us: Popular Sovereignty and Why We Have Government*, 67-Dec. FED. LAW3, 3–4 (2022) (offering that government exists to serve the people); *Speeches & Writings, The Gettysburg Address (Bliss Copy)*, ABRAHAM LINCOLN ONLINE, https://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm (last visited Feb. 14, 2023) (referring to the American government as "of the people, by the people, for the people").

[247] Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1397 (2006); Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329, 333 (2003); *see also* Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 413 (1979) (stating that the Framers of the Constitution hoped that federalism would help prevent a "concentration of power").

destructive of the people's freedom.[248] More to the point still, representative democracy is not our chosen political system in order to exalt democracy. Democracy is instead the Constitution's structural empowerment of the people so that they can restrain government from overreach and thereby preserve their own liberty.[249]

The tripartite structure—of federalism, separation of powers, and representative democracy—is, at one and the same time, both a prominent part of the Constitution and the source of an accepted method of constitutional interpretation.[250] The methodology—called structuralism—requires interrogating these three constitutionally-imposed structures for purposes of drawing inferences from them when trying to interpret enigmatic constitutional provisions,[251] including whether new fundamental constitutional rights arise from the provisions.[252] In the following analysis, I will use this structure and its derivative methodology in support of recognition of a fundamental constitutional right to vote per se. The part of the structure of greatest interest is representative democracy.

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[248] *See* Henkin, *supra* note 247, at 413; William T. Coleman, Jr., *Federalism, the Great Vague Clauses and Judicial Supremacy: Their Constitutional Role in the Liberty of a Free People*, 49 U. PITT. L. REV. 699, 702 (1988); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 272 (2005).

[249] *See* Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 ARIZ. L. REV. 183, 185 (2020) (explaining that the Framer's chose self-government because they viewed monarchy as corrupt and tyrannical); ENCYCLOPEDIA OF POLITICAL THOUGHT 81 (Garrett Ward Sheldon ed., 2001) (explaining that the purpose of a democracy is to prevent dictatorship and tyranny); Mary C. Segers, *Religion and Liberal Democracy: An American Perspective, in* PIETY, POLITICS, AND PLURALISM: RELIGION, THE COURTS, AND THE 2000 ELECTION 1, 2 (Mary C. Segers ed., 2002).

[250] David S. Ardia, *Beyond the Marketplace of Ideas: Bridging Theory and Doctrine to Promote Self-Governance*, 16 HARV. L. & POL'Y REV. 275, 294–95 (2022) (discussing the constitutional interpretation method of structuralism and explaining that these three components help create structural interpretation).

[251] Jonathan L. Marshfield, *Amendment Creep*, 115 MICH. L. REV. 215, 220–21 (2016); Zephyr Teachout, *Constitutional Purpose and the Anti-Corruption Principle*, 108 NW. U. L. REV. ONLINE 200, 210–11 (2014); David S. Ardia, *Beyond the Marketplace of Ideas: Bridging Theory and Doctrine to Promote Self-Governance*, 16 HARV. L. & POL'Y REV. 275, 294–95 (2022).

[252] *See* Marshfield, *supra* note 251, at 225–27.

Although the Constitution contains no explicit commitment to representative government, the document is brimming with implicit commitments to democracy such that there is no mistaking their meaning.[253] Article I's establishment and empowerment of Congress stands out as one such commitment[254] and takes pride of place as a "People's House."[255] A brief but telling sampling of other democracy-laden provisions includes those mandating: the direct election of U.S. Representatives and Senators;[256] the indirect election of the U.S. President;[257] the appointment of federal judges by the President with "the Advice and Consent of the Senate";[258] and the ban on Congress's granting titles of nobility.[259] Undeniably, requiring elections and advice and consent, plus putting the kibosh on creating a formal aristocracy, all work toward establishing democratic rule. Many of the Constitution's Amendments convey a similar fidelity to the people's governance. The First Amendment's Free Speech Clause,[260] ultimately rests on the bedrock notion that Americans are not to be muzzled or penalized by government for contributing to the marketplace of ideas.[261] The Fourteenth Amendment's Equal Protection Clause,[262] is underpinned by the tenet that the law must treat like persons alike unless government

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253 *See supra* note 17 and accompanying text.

254 U.S. CONST. art. I, § 1.

255 "The Peoples House" is a moniker for the White House. *About the White House*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/ (last visited Feb. 14, 2023). It is also sometimes a nickname for the U.S. House of Representatives. *History of the House*, U.S. HOUSE OF REPRESENTATIVES, https://www.house.gov/the-house-explained/history-of-the-house (last visited Feb. 14, 2023).

256 U.S. CONST. art. I, § 2 (detailing the election of members to U.S. House of Representatives); U.S. CONST. amend XVII (detailing the election of members to U.S. Senate).

257 U.S. CONST. art. II, § 1.

258 U.S. CONST. art. II, § 2.

259 U.S. CONST. art. I, § 9.

260 U.S. CONST. amend. I.

261 G. Michael Parsons, *Fighting for Attention: Democracy, Free Speech, and the Marketplace of Ideas*, 104 MINN. L. REV. 2157, 2158 (2020); Terri R. Day & Danielle Weatherby, *Shackled Speech: How President Trump's Treatment of the Press and the Citizen-Critic Undermines the Central Meaning of the First Amendment*, 23 LEWIS & CLARK L. REV. 311, 321 (2019); Erin L. Miller, *Amplified Speech*, 43 CARDOZO L. REV. 1, 6 (2021).

262 U.S. CONST. amend. XIV, § 1.

has legally justifiable reasons for discriminating.[263] And, as detailed in Part I of the Article, a cluster of amendments protect against interference with particular aspects of voting.[264]

In light of the above, it verges on the obvious to say that a fundamental constitutional right to vote per se should be reasonably inferable from the entirety of the Constitution's tacit allegiance to democracy.[265] The Supreme Court has been acutely aware of this inference despite waffling on recognition of the right.[266] In *Reynolds v. Sims*,[267] for example, the Court proclaimed that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government,"[268] and that "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights."[269]

Yick Wo v. Hopkins[270] offers a particularly sage insight regarding the structural role of the right to vote. The Court vouchsafed that "in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts."[271] Expatiating on this thought, *Yick Wo* spotlights that the people's sovereignty—if it is to be real—must be discharged either through informally exerting political pressure or through voting—powers subject only to the limits set by law.[272]

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263 ROTUNDA & NOWAK, *supra* note 170, § 18.1, at 306–08.

264 *See supra* note 42 and accompanying text.

265 *See* Douglas, *supra* note 1, at 86 (discussing that the right to vote is fundamental to a democratic society).

266 *See supra* notes 10–13 and accompanying text; *see also, e.g.*, Burson v. Freeman, 504 U.S. 191, 198–99 (1992) (stating that the right to vote for a preferred candidate is at the core of a democracy); Shaw v. Reno, 509 U.S. 630, 639 (1993) ("The right to vote freely . . . is of the essence of a democratic society."); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994) (arguing that voting is a person's "most significant opportunity to participate in the democratic process" (quoting Powers v. Ohio, 499 U.S. 400, 407 (1991))).

267 Reynolds v. Sims, 377 U.S. 533 (1964).

268 *Id.* at 555.

269 *Id*. at 562.

270 Yick Wo v. Hopkins, 118 U.S. 356 (1886).

271 *Id.* at 370.

272 *Id*.

The notion of the people's sovereignty is very liable to slip from sight. It is not the stuff of our daily rounds. But, the people functioning as sovereigns through the right to vote is not just a deduction from and a support of the tripartite constitutional structure;[273] this functioning is also the engine of a related structural regime—that of checks and balances.[274] If newspapers and other news outlets be called the "fourth estate,"[275] then perhaps the voting public is a fifth estate. It is, after all, exclusively the people who are empowered to vote out substandard elected officials and to vote in substitutes of improved intellect, morality, and/or conscientiousness.[276] It is the people who, in this way, can check and balance corrupt or malignant legislatures and governmental executives.[277] It is the people who, as a virtual court of history,[278] may, unbidden, play ethics-arbiter-in-chief for society as a whole or serve as the judiciary's de facto aide de camp.[279]

In order to invest the citizenry with the full responsibilities of citizenship in furthering democracy as the fifth estate, the Court would do well to recognize a fundamental right to vote per se as a structural inference from the Constitution. Lest the prospect of a sort of free-floating fundamental constitutional right to vote appears unorthodox, it is worth remembering that the Court found a fundamental right to travel through or visit other states as implied in

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[273] *See* Reese, *supra* note 246, at 2111.

[274] *See* Paul E. McGreal, *Ambition's Playground*, 68 FORDHAM L. REV. 1107, 1107 (2000) (describing the American system of government as "the three branches of the federal government and the People—duk[ing] it out"); *see also* Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361, 361 (1993) (characterizing checks and balances as "[o]ur historically predominant principle" of government).

[275] *Fourth Estate*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/fourthestate (last visited Feb. 27, 2023).

[276] *See* McGreal, *supra* note 274, at 1115 n.30.

[277] *See id.* at 1107 (ascribing to the American people a role in providing checks and balances to the government).

[278] *See* GEORGE WILHELM FRIEDRICH HEGEL, THE PHILOSOPHY OF RIGHT ¶ 341, at 216 (T.M. Knox trans., Oxford University Press ed., 1952) ("World history is a court of judgment."); JOHANN CHRISTOPH, FRIERICH SCHILLER, RESIGNATION (1786), www.michaelbryson.net/academic/schiller-resignation.pdf (last visited Mar. 15, 2023) ("The world's history is the world's judgment.").

[279] *See* McGreal, *supra* note 274, at 1107 (discussing the People's role in the Constitutional structure of checks and balances).

several different clauses of the Constitution without settling on any one of them as an exclusive locus.[280] If it is permissible for the Court to tether that unenumerated right to a bevy of clauses, it should be no stretch to lodge the fundamental right to vote per se in that part of the government's structural edifice upholding representative governance.

F. *Citizenship Clause*

The Citizenship Clause is set forth as the opening sentence of Section 1 of the Fourteenth Amendment and provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[281] There is something about the very name and text of the Clause that is evocative of voting rights. Voting, after all, is conduct in which mostly American citizens engage[282] and is a measure of engaged citizenship.[283] Yet, the Court has never dealt with the Clause's bearing on suffrage, and the legal academy also seems quite disinterested.[284] Apparently what language and rationality impetrate have not piqued juristic agendas.

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[280] *See* ROTUNDA & NOWAK, *supra* note 170, § 18.38, at 367 (5th ed. 2012) (recounting that the right to "transportation between and among the states" has been variously situated in the "commerce clause of Article I, the privileges and immunities clause of Article IV, or all three clauses of the second sentence of the Fourteenth Amendment").

[281] U.S. CONST. amend. XIV, § 1.

[282] *See Who Can and Can't Vote in U.S. Elections?*, USA.GOV, https://www.usa.gov/who-can-vote (Aug. 23, 2022) (advising that American citizens can vote in U.S. federal, state, and local elections if they are 18 years old or older on or before Election Day, meet a state's residency requirements, and are registered to vote in a timely fashion, but that non-citizens are also allowed to vote in some local elections).

[283] *See* Rebeca Jacobsen & Tamara Wilder Linkow, *The Center for Information & Research on Civic Learning & Engagement, Circle Working Paper #74, The Engaged Citizen Index: Examining the Racial and Ethnic Civil and Political Engagement Gaps of Young Adults* 2-7 (2012), https://circle.tufts.edu/sites/default/files/2020-01/WP74_EngagedCitizen_Index_2012.pdf (using voter turnout as one criterion, among others, to access civic and political engagement).

[284] An exception to the professoriate's otherwise blanket silence on connecting the right to vote to the Citizenship Clause is Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281, 319–20 (2000). However, that article solely concerns the right to vote for members of Congress—a right that is

The ongoing indifference to possibly linking the Citizenship Clause with voting is concededly a deterrent to urging the Clause as support for a fundamental right to vote per se.[285] However, because both text and inference almost organically suggest the right, I take a page from Charles Dickens to "never say die."[286] Indeed, if the Court could at long last resurrect the decimated Privileges or Immunities Clause, as it did in 1999,[287] who knows but that the Justices could also see their way to infusing the Citizenship Clause with a fundamental right to vote per se?

G. *Guarantee Clause*

Another underutilized provision of the Constitution is Article IV, Section 4's Guarantee Clause, which avers, in pertinent part: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion . . . ."[288] Like the Citizenship Clause, the Guarantee Clause is linguistically denotive of voting.[289] The phrase "Republican Form of Government," in title case, intimates that the Clause should protect suffrage.[290] The word "republican," though capable

much narrower than the right to vote per se. On that basis, the Zietlow article is inapposite to the instant project.

In addition, Professor Zietlow's argument for assigning the more limited right to the Citizenship Clause seems superfluous since that right is already grounded in the Constitution's Article I, Section 2, as modified by the Seventeenth Amendment. These latter two provisions, considered together, posit that members of the U.S. House of Representatives and Senate "shall be . . . chosen by the People of the several States." Moreover, the Court has previously interpreted them to give rise to the same right—a constitutional right to vote for federal legislators. United States v. Classic, 313 U.S. 299, 314 (1941).

[285] *See supra* note 284 and accompanying text.

[286] It is said that Charles Dickins used the phrase in his novel *Pickwick Papers*. *Never Say Die*, THE FREE DICTIONARY BY FARLEX, https://idioms.thefreedictionary.com/Never+Say+Die (last visited Feb. 27, 2023).

[287] Saenz v. Roe, 526 U.S. 489, 490 (1999).

[288] U.S. CONST. art. IV, § 4.

[289] *See supra* notes 282–84 and accompanying text.

[290] U.S. CONST. art. IV, § 4.

of several shades of meaning, is also synonymous with "democratic";[291] and, democracy is not doable unless the citizenry can vote.[292]

Literalism's lessons aside, the Justices have to date declined to infer any voting rights from this provision. The fact is that it has never been a seedbed of rights or, really, much else because the Court held claims brought under the Clause to be nonjusticiable as political questions[293]—a barrier to litigation that still obtains.[294] Implausibly, this has not stopped the Court from reaching the merits in a smattering of cases.[295] The inconsistency has led the Court to finally concede that the nonjusticiability bar under the Guarantee Clause is not absolute,[296] and led many commentators to opine that the political question bar should be discarded.[297]

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[291] According to at least three sources, the words "republic" and "democracy" are frequently used interchangeably. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 122–23 (1980) (explaining that some of the Constitution's Framers understood a "republican form of government" to imply a representative democracy); André Munro, *Republic*, BRITANNICA (Aug. 24, 2022), https://www.britannica.com/topic/republic-government (explaining that most modern representative democracies function as republics); *Republic*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/republic (last visited Feb. 14, 2023).

[292] *See supra* note 1 and accompanying text; *Voting Rights and Democracy*, Constitutional Accountability Center, https://www.theusconstitution.org/issues/voting-rights-democracy/ (last visited Feb. 23, 2023).

[293] Luther v. Borden, 48 U.S. 1, 42–43 (1849).

[294] *See* David S. Louk, *Reconstructing the Congressional Guarantee of Republican Government*, 73 VAND. L. REV. 673, 687 (2020) ("[U]p to the present day, the Court has repeatedly disclaimed opportunities to give the [Guarantee] Clause meaning on the basis of the Clause's nonjusticiability" due to the political question doctrine).

[295] *See*, *e.g.*, Attorney Gen. of Mich. *ex rel.* Kies v. Lowrey, 199 U.S. 233, 239 (1905); Forsyth v. Hammond, 166 U.S. 506, 519 (1897); *In re* Duncan, 139 U.S. 449, 461–62 (1891).

[296] *See* New York v. United States, 505 U.S. 144, 184–85 (1992) (expounding on the Court's practice of occasionally deciding cases on their merits under the Guarantee Clause).

[297] *E.g.*, ELY, *supra* note 291, at 118; WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 287–89, 300 (1972); Arthur E. Bonfield, *The Guarantee Clause of Article IV, § 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 560–65 (1962); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 860–63 (1994);

One of the suits in which the Court went directly to the merits is *Minor v. Happersett*,[298] in which a female, white American citizen brought suit claiming, among other things, that the government had violated the Guarantee Clause by preventing her from voting in federal elections because she was a woman.[299] The Court took a parsimonious view of the Clause, holding that it could not be read as the provenance of women's right to vote in federal elections since that right had not existed when the Constitution was adopted.[300] That is, the *Minor* Justices did not construe the Clause to be a source for newly recognized constitutional rights, let alone a guarantee of a full-blown democracy inclusive of female voters.[301]

Among constitutional experts there is debate about whether the Guarantee Clause should be understood as structural, i.e., in the sense of a one-off commitment to republican government in the

Jason Mazzone, *The Incorporation of the Republican Guarantee Clause*, 97 NOTRE DAME L. REV. 1435, 1466 (2022).

[298] 88 U.S. 162 (1874). The Guarantee Clause was also notably revisited for its substantive worth in Justice Harlan's dissent in Plessy v. Ferguson, 163 U.S. 537, 564 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Board of Education, 347 U.S. 483, 494–95 (1954) (contending that the Guarantee Clause is a sound basis for invalidating the challenged law requiring "separate but equal" facilities for Caucasians and African-Americans).

[299] *Minor*, 88 U.S. at 175–76.

[300] *Id.* at 162, 175–76, 178.

[301] *See id.* at 175–76 (adjudging that the Guarantee Clause applies to state governments only in the form in which they existed at the time of the Constitution's adoption, e.g., without a right of suffrage for women).

states,[302] or as a repository of individual rights.[303] The second camp—the rights-in-the-Clause-advocates—is buttressed by evidence of original intent from the Constitution's Framers. For instance, both Alexander Hamilton[304] and James Madison[305] expressed the view that the guarantee of a republican form of government would shield the fledgling country from deteriorating into monarchy. Generally speaking, monarchy is a system under which the people are unable to participate politically and vote on important societal matters.[306] So, it requires no mental leap to conclude that the original intent inspiring the Clause is partly an intent to protect the people's right to vote.

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[302] *See*, *e.g.*, Anthony Johnstone, *The Federalist Safeguards of Politics*, 39 HARV. J.L. & PUB. POL'Y 415, 442 (2016) (offering that the Guarantee Clause "function[s] as the Union's shield for the defense of anti-republicanism in the States, and not as the Union's sword for the imposition of a particular republicanism on the States"); Catherine A. Rogers & David L. Faigman, "*And to the Republic for Which It Stands": Guaranteeing a Republican Form of Government*, 23 HASTINGS CONST. L.Q. 1057, 1067 (1996) (describing the Guarantee Clause as requiring a "state process of decisionmaking that checks factious majorities" and as making the federal government guarantor to ensure states comply with their republican duties); Ann Althouse, *Time for the Federal Courts to Enforce the Guarantee Clause? – A Response to Professor Chemerinsky*, 65 U. COLO. L. REV. 881, 881–82 (1994) (advancing the notion that the Guarantee Clause's function is exclusively structural); Shapiro, *supra* note 249, at 185 (2020) (submitting that "the Guarantee Clause is a structural promise between the states and the federal government").

[303] *See*, *e.g.*, Chemerinsky, *supra* note 297, at 851, 861, 864, 867, 869 (asserting that "the Guarantee Clause should be regarded as a protector of basic individual rights"); ELY, *supra* note 291, at 118–19 (professing that the right to vote in state elections "is most naturally assignable to the Republican Form Clause"); *cf*. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 85–86 (1990) (positing that the Guarantee Clause should be interpreted to mean that government should be by majority vote).

[304] *See* THE FEDERALIST NO. 85 (Alexander Hamilton) ("The additional securities to republican government, to liberty and to property, to be derived from the adoption of the plan under consideration, consist chiefly in the restraints which the preservation of the union will impose . . . on the ambition of powerful individuals in single states, who might acquire credit and influence enough, from leaders and favorites, to become the despots of the people . . . .").

[305] *See* THE FEDERALIST NO. 43 (James Madison) ("In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchial innovations.").

[306] *See* Chemerinsky, *supra* note 297, at 867–68.

The list is long of scholars opining that the Guarantee Clause must, at a minimum, assure some type of majority rule in state governments.[307] As mentioned previously, majority rule, unless produced by a stray incident of mob rule, is usually achieved through voting in elections.[308] Consistent with this perception, other scholars have pointedly argued that the Guarantee Clause should protect the right to vote.[309]

The foregoing means that the Justices and a portion of the professoriate find themselves at odds over the Clause's significance. It is a waste of the Framers' efforts—those revered seminal efforts manifested in the bare bones wording of the Clause—that the Court has not backed down from its holding in *Happersett* nor stepped up to recognize a fundamental right to vote per se in the Guarantee Clause. To change course, the Court need not move analytical mountains. Quite the contrary, the Court may revert to the old methodological warhorses of textualism and originalism in an

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[307] *See, e.g.*, Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994) (maintaining that the Constitution must be legally alterable by a majority of people in order to satisfy the Guarantee Clause); Gabriel J. Chin, *Justifying a Revised Voting Rights Act: The Guarantee Clause and the Problem of Minority Rule*, 94 B.U. L. REV. 1551, 1562 (2014) (stating that the Guarantee Clause is meant to safeguard majority rule); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 114 (2000) (declaring that the Guarantee Clause must at least mean "that a majority of the whole body of the people ultimately governs"); Jacob M. Heller, Note, *Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions*, 62 STAN. L. REV. 1711, 1718 (2010) (contributing that republican governments, among other things, "rule . . . by the majority (and not a monarch)"); Bonfield, *supra* note 297, at 560 (specifying that a republican form of government might entail effective elections involving "a fairly large group" of society).

[308] *See supra* note 1 and accompanying text.

[309] Bonfield, *supra* note 297, at 560; ELY, *supra* note 291, at 118; Chemerinsky, *supra* note 297, at 868–69; Heller, *supra* note 307, at 1755; Brief of Constitutional Law Scholars as *Amici Curiae* Supporting Plaintiffs at 14, 18, The Democratic Party of Wis. v. Vos, 408 F. Supp. 3d 951 (W.D. Wis. 2019) (No. 19-cv-142-jdp) ("At its core, the Guarantee Clause protects popular sovereignty and dictates that the voters have the power to choose the officials who will effectuate their will . . . . If the Guarantee Clause is to have any force, it should protect against this type of threat to the health of our republican government.").

entirely orthodox judicial exercise.[310] Should the Court also eliminate the non-justiciability bar, the Guarantee Clause and a subsumed fundamental right to vote per se could finally have real-world impacts against the threat of autocracy—impacts the Clause was meant to effectuate.[311]

IV. REMEDIAL ASPECTS OF THE U.S. SUPREME COURT'S FUTURE RECOGNITION OF A FUNDAMENTAL CONSTITUTIONAL RIGHT TO VOTE PER SE

This Part is a more immersive look at the interface between recognition of a fundamental right to vote per se in the Constitution and the vitality of American democracy. This Part does not concern representative democracy as a structural component of the Constitution but, instead, democracy writ large as inextricable to the American experience. I include this topic because there is an apprehensible risk that our democracy is becoming increasingly difficult to preserve,[312] and because the Court's clear recognition of a fundamental constitutional right to vote per se could substantially head off that alarming trend.[313] Here is how:

A. *The Protective Effect on Democracy of a Hybrid Intermediate Standard of Judicial Review*

In the event that the Supreme Court were to incontrovertibly elevate the constitutional right to vote per se to fundamental status, judges would customarily review the constitutionality of a challenged statute impinging on the right via strict scrutiny.[314] The latter requires the defendant to show that it has a compelling purpose for the enactment and that the enactment is narrowly tailored to

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[310] The Court may use textualism and originalism to recognize a fundamental right to vote per se in the Guarantee Clause, because both the syntax of the Clause and evidence of the Framers' understanding of the Clause support that result—matters covered previously in this Article. *See supra* notes 304–05 and accompanying text.

[311] *See supra* notes 293–97 and accompanying text.

[312] *See* LEVITSKY & ZITBLATT, *supra* note 6; *see also A Year After Capital Riot, Americans Fear for Their Democracy: Polls*, *supra* note 6.

[313] *See infra* Section IV.B and accompanying text.

[314] *See* L. Info. Inst., *supra* note 94.

achieving the purpose.[315] This is a heavy burden to shoulder, and most laws subjected to strict scrutiny are struck down as unconstitutional.[316] Strict scrutiny protects the right so that it will remain intact and muscular enough to safeguard the right-holders for another day.[317]

However, strict scrutiny is not the Court's only approach. It does sometimes happen that the Court applies varying formulations of intermediate scrutiny when asked to review the constitutionality of government impingement of a fundamental constitutional right.[318] In its plain-vanilla formulation, the intermediate standard is somewhat less onerous than strict scrutiny for the defendant whose burden is to show that a challenged statute has an important govern-

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[315] *See id.*

[316] *See* JANET V. LEWIS, SEXUAL HARASSMENT: ISSUES AND ANALYSES 63, 84 (2001).

[317] *See id.*

[318] *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (plurality decision) (explaining that in a case where the claim is violation of a fundamental substantive due process right of family members to live together in one domicile, fashioning a test of constitutionality that is highly reminiscent of intermediate scrutiny, i.e., "this Court must examine carefully the *importance* of the governmental interests advanced and the extent to which they are served by the challenged regulation") emphasis added)); Zablocki v. Redhail, 434 U.S. 374, 387–88 (1978) (explaining that in equal protection litigation involving the fundamental constitutional right to marry, relying on a test of constitutionality using the stock phraseology of intermediate scrutiny, i.e., the challenged law must be "supported by sufficiently *important* state interests and . . . [be] *closely tailored*" to carrying out those interests (emphasis added)).

For commentators agreeing that the Court in the *Moore* case used intermediate scrutiny, see, e.g., John G. Sprankling, *The Constitutional Right to "Establish a Home"*, 90 GEO. WASH. L. REV. 632, 686 (2022); *Assessing the Viability of a Substantive Due Process Right to In Vitro Fertilization*, 118 HARV. L. REV. 2792, 2806–08 (2005); Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 643 n.110 (1992). For commentators agreeing that the Court in the *Zablocki* decision used intermediate scrutiny, see, e.g., *Assessing the Viability of a Substantive Due Process Right to In Vitro Fertilization*, 118 HARV. L. REV. 2792, 2806–07 (2005); Rachel Stephanie Arnow, *The Implantation of Rights: An Argument for Unconditionally Funded Norplant Removal*, 11 BERKLEY WOMEN'S L.J. 19, 33 (1996). For commentators positing that the Court obscured what test of constitutionality it used in *Zablocki*, see ROTUNDA & NOWAK, *supra* note 170, at 325 (5th ed. 2012) (observing that in *Zablocki*, the Court did not state "a clear standard of review").

mental purpose and that the statute is substantially related to carrying out the purpose.[319] Intermediate scrutiny merely makes it likely, rather than probable, that the statute will be invalidated.[320]

I propose that, regardless of whether the fundamental right to vote per se lands in the Equal Protection Clause or another constitutional provision, the Court should use a more demanding, hybrid form of intermediate scrutiny on statutes impinging upon this right. It is helpful that there is an existing set to choose from.[321] One version, used by the Court in *United States v. Virginia* ("*VMI*"),[322] prescribes that when government discriminates on the basis of gender, the discriminatory law will survive judicial review only if defendant fulfills three requirements: (1) that defendant has an exceedingly persuasive justification for the law; (2) that the law serves an important purpose which is real and not predicated on gender stereotyping; and (3) that the law is substantially related to achieving the

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[319] L. Info. Inst., *Intermediate Scrutiny*, CORNELL LAW SCHOOL https://www.law.cornell.edu/wex/intermediate_scrutiny (last visited Feb. 28, 2023).

[320] *See* LEWIS, *supra* note 316, at 84 ("Most statutory classifications subject to strict scrutiny are invalidated," while intermediate scrutiny is "not as rigorous"); RICHARD H. FALLON, JR., THE NATURE OF CONSTITUTIONAL RIGHTS: THE INVENTION AND LOGIC OF STRICT JUDICIAL SCRUTINY 90 (2019) (proposing that intermediate scrutiny provides less protection to a right in issue while posing "less of a threat to competing governmental interests").

[321] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 532–33 (1996) [hereinafter *VMI*] (using the standard of review that a law challenged as illegal gender discrimination complies with the Equal Protection Clause if the law has an exceedingly persuasive justification, serves an important purpose which is real and not predicated on gender stereotyping, and is substantially related to achieving that purpose); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (holding that content-neutral regulations of speech, occurring in a traditional public forum, survives a Free Speech Clause suit if, among other things, the regulation is narrowly tailored to serve a significant government interest); Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564, 566 (1980) (holding that a content-based regulation of non-misleading, lawful commercial speech passes Free Speech Clause analysis if the regulation directly advances a substantial government interest and is not more extensive than necessary to serve that interest).

[322] *VMI*, 518 U.S. 515, 532–33 (1996).

purpose.[323] Of course, the transposed *VMI* standard would then entail some tweaking to delete the stipulation that government's purpose must not be founded on gender stereotyping.[324]

Other hybrid standards may be found in Free Speech Clause cases where the Court introduced an element of strict scrutiny into the intermediate level test.[325] For example, the Court ruled that, in a traditional public forum, statutory content-neutral regulations of expression are only constitutional if, among other things, the regulations are narrowly tailored to serve a significant government interest.[326] The substitution of "narrow tailoring" for "substantially related" makes this standard more difficult for the defendant to fulfill than under normal intermediate scrutiny.

Nothing prohibits creative jurists, including the Justices, from transporting any of the enhanced standards for use under another constitutional clause and in the absence of gender discrimination or free speech claims. And, these more stringent intermediate scrutiny standards seem almost tailor-made for lawsuits concerning impingements on a fundamental constitutional right to vote per se.[327] As discussed earlier, the Constitution leaves it up to the states to determine the logistics of voting in federal elections,[328] and the states are also in charge of voting arrangements for their own

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[323] *Id.*; *see also Clark*, 468 U.S. at 288.

[324] *VMI*, 518 U.S. at 532–33.

[325] *See, e.g.*, *Clark*, 468 U.S. at 293 (upholding, under the Free Speech Clause, content-neutral regulations of speech in a traditional public forum if, among other things, the regulation is narrowly tailored to serve a significant government interest); *Central Hudson Gas & Elec.*, 447 U.S. at 564, 566 (1980) (ruling that a regulation of non-misleading, lawful commercial speech is consistent with the Free Speech Clause if the regulation directly advances a substantial government interest and is not more extensive than necessary to serve that interest).

[326] *Clark*, 468 U.S. at 293, 296–99. In addition to the standard of review as described in the text above, the standard also requires defendant to show that its regulation of speech leaves open ample alternative channels for communicating the information. *Id.* at 293*; see also* 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.47(d)(ii), at 509 (5th ed. 2013) (pointing out that the *Clark* enhanced intermediate scrutiny used for content-neutral regulations of speech applies in both traditional and designated public forums).

[327] *See supra* note 321 and accompanying text; *infra* notes 330–32 and accompanying text.

[328] *See supra* notes 37–38 and accompanying text.

elections.[329] States thus need the "wiggle room" afforded by the altered *VMI* or Free Speech Clause standards to meet these responsibilities—room not often afforded by strict scrutiny. Though not a perfect solution, the real beauty of the proposed standards is that they provide the states with regulatory latitude, but ought not to unnecessarily result in sacrificing the right to vote.

Serendipitously, there is yet another reason why the modified standards are appropriate in this context. Consider that in *Burdick v. Takushi*,[330] an equal protection case evidently concerning the fundamental equal right to vote, the Court made judicial review of a challenged voting system pivot on the type of governmental burden placed on the franchise, with benign burdens subject to intermediate scrutiny.[331] The *Burdick* Court ruled that if a governmental burden on a voting right was neutral, reasonable, and not severe, then the Court would uphold such interference if justified by the state's "important regulatory interests."[332] Note that the Court's use of the word "important" parallels the word's use in the first prong of traditional intermediate scrutiny.[333] *Burdick* may thereby indicate some judicial receptivity to the tweaked *VMI* test should the Court eventually encounter a case of impingement of a recognized fundamental constitutional right to vote per se.

Drawing the threads together, it is possible that the revised standards would make the Court more comfortable about recognizing a fundamental constitutional right to vote per se. Should the Court take that step, a beefed-up intermediate scrutiny standard would enable upholding the right more often than not. And, that eventuality should be an aid to our overstressed democracy. The next section sets forth how the right would bring off such a salutary transformation.

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329 *See* discussion *supra* Part II.

330 Burdick v. Takushi, 504 U.S. 428 (1992).

331 *Id.* at 434.

332 *Id.*

333 *See supra* note 321 and accompanying text.

B. *The Protective Effect of the "Fifth Estate" on Democracy*

A republic worthy of the name is not apt to survive and flourish over the centuries without the consent of the governed.[334] "Consent of the governed" has become a bit of a shibboleth in describing the crux and core of democracy. Nevertheless, the superficial adages by which we unthinkingly say we live may still exist at the level of principles actually shaping how we do live. So it is with this one, which materialized from seventeenth-century philosophical and political thought that profoundly influenced the drafting of the Constitution.[335] John Locke, a "grandfather" to our Constitution,[336] urged the "consent of the governed" as a defense against monarchy and a prerequisite to government that is responsive to the people.[337] The

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[334] *See* Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 930–31 (1998) (stating that a republic, like the United States, must be founded on the consent of the governed); David Schoenbrod, *How to Salvage Article I: The Crumbling Foundation of Our Republic*, 40 HARV. J.L. & PUB. POL'Y 663, 665–66 (2017) (alleging that the federal government, a republican form of government, rests upon the consent of the governed); BRUCE P. FROHNEN & GEORGE W. CAREY, CONSTITUTIONAL MORALITY AND THE RISE OF QUASI-LAW 82 (2016) (declaring that, as recognized by the Framers, "republican government means rule dependent upon the consent of the governed").

[335] *See* James A. Gardner, *Consent, Legitimacy, and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 192–93 (1990).

[336] *See id.* (tracing the American Revolution, the Declaration of Independence, and the Constitution to John Locke's writings concerning the consent of the governed); Donald L. Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52, 57–60, 65–67 (1985) (expounding on John Locke's influence on the American Revolution, the Declaration, and the Constitution).

[337] *See* Doernberg, *supra* note 336, at 58 (writing that the Framers formed the government based upon the Lockean consent of the governed); David Schoenbrod, *Consent of the Governed: A Constitutional Norm That the Court Should Substantially Enforce*, 43 HARV. J.L. & POL'Y 213, 219–20 (2020) (saying that the Framers, pursuant to John Locke's ideas, established the legislative branch to implement the consent of the governed); Gardner, *supra* note 335 at 207–13, 267 (providing a close historical analysis of how "the consent of the governed" came to infuse the Constitution); Russell L. Weaver, *"Advice and Consent" in Historical Perspective*, 64 DUKE L.J. 1717, 1722–24 (2015) (referring to John Locke's ideas as undergirding the Constitution and so as to repudiate notions of divine right and hereditary succession); Amit Khardori, *What Does the State Owe to Its People? Toward a "Responsibility to Develop"*, 46

idea has had staying power as one of the lodestars for attaining good governance.[338] Evidence of this is that the phrase appears, expressly and in title case, in the Declaration of Independence:

> We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, *deriving their just Powers from the Consent of the Governed* . . . .[339]

The Declaration is one of America's foundational documents and, despite not itself being law,[340] has served many times as a go-to source of extraconstitutional values useful in constitutional interpretation.[341]

Voting is one means of conveying the consent of the governed.[342] Consent or the lack thereof may, of course, manifest in venues besides the voting booth: demonstrations, strikes, law review articles, etc. However, and as mentioned before, voting possesses characteristics which make it of unique import in transmitting the consent of the governed.[343] Elections for public officials and on public policy are governmentally authorized events.[344] These are

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BYU L. REV. 1027, 1032–33, 1035 (2021) (postulating that John Locke and other Enlightenment Era thinkers saw consent of the governed as the way to forge democracy and respect toward individual rights).

338 *See* Weaver, *supra* note 337, at 1722–24.

339 THE DECLARATION OF INDEPENDENCE (1776) (emphasis added).

340 Darrell A. H. Miller, *Continuity and the Declaration of Independence*, 89 S. CAL. L. REV. 601, 602 (2016).

341 *See* Charles H. Cosgrove, *The Declaration of Independence in Constitutional Interpretation: A Selective History and Analysis*, 37 U. RICH. L. REV. 107, 108 (1998).

342 Frances R. Hill, *Putting Voters First: An Essay on the Jurisprudence of Citizen Sovereignty in Federal Election Law*, 60 U. MIAMI L. REV. 155, 156 (2006); *see* Gardner, *supra* note 335, at 192 (maintaining that elections may accurately reflect the consent of the governed); Amar & Brownstein, *supra* note 334, at 924 ("Voting was the means by which that consent [of the governed] could be expressed or withheld.").

343 *See supra* notes 334–36 and accompanying text.

344 L. Info. Inst., *Elections*, CORNELL L. SCH., https://www.law.cornell.edu/wex/elections (last visited Feb. 11, 2023) (positing that "government

legal functions in which the governed are invited to participate and where concrete choices are solicited from them on the various issues of how the polity should proceed.[345] Moreover, when a citizen votes, the relevant governmental body is under a constitutional duty to count the vote.[346] Voting is no whistling in the wind; it will be impactful one way or the other. Voting is therefore the apotheosis of the consent of the governed, and the consent of the governed, through this agency, is a practical modus operandi of democracy.

To any skeptics out there, I ask this question: what is the opposite of voting? The answer is non-voting—nobody gets to vote. Under that circumstance, autocracy has arrived or just about done so. The only *complete* remedy for such a quietus and its political dangers is a fundamental constitutional right to vote per se. In fine, the fundamental constitutional right to vote per se is a sine qua non of our democracy and consummate defense against its degeneration into fascism.

The world has had enough experience with dictatorships to know what they portend. Hitler,[347] Mussolini,[348] Mao,[349] and Pol Pot[350] are just a few of the twentieth-century despots leaving in their wake unfathomable amounts of bloodshed and human suffering.[351] Tyranny, of course, was not invented in that beleaguered era. It had

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must play an active role in structuring elections and the electoral process" so that citizens can make choices by voting).

345 *Id.*

346 *See supra* notes 63–69 and accompanying text.

347 *See* John Lukacs, *Adolf Hitler: Dictator of Germany*, BRITANNICA (Oct. 04, 2022), https://www.britannica.com/biography/Adolf-Hitler (detailing Hitler's role as dictator of Germany, instigator of World War II, and perpetrator of the Holocaust).

348 *See* John Foot, *Benito Mussolini: Italian Dictator*, BRITANNICA (Aug. 30, 2022), https://www.britannica.com/biography/Benito-Mussolini (chronicling the rule of Mussolini as dictator of Italy and part of the Axis in World War II, including its anti-semitic program).

349 *See* Stuart Reynolds Schram, *Mao Zedong: Chinese Leader*, BRITANNICA, https://www.britannica.com/biography/Mao-Zedong (last updated Dec. 22, 2022) (describing Mao's brutal rule in China).

350 *See* Adam Zeidan, *Pol Pot: Cambodian Political Leader*, BRITANNICA, https://www.britannica.com/biography/Pol-Pot (last updated Sept. 26, 2022) (recounting the atrocities of the totalitarian regime of Pol Pot).

351 *See supra* notes 347–50.

stalked humankind long before[352] and threatens us still.[353] Far right-wing nationalist movements are afoot around the globe.[354] The United States' 2020 presidential election came close to being abrogated by such forces.[355] And, as I write in 2022, we are watching the spectacle of Vladimir Putin brutally invading Ukraine because, in part, it is a democracy determined to operate independently of the Russian dictator's hegemonistic designs.[356] This is an inflection point at which to become especially protective of democracy.

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[352] *See generally* MOISÉS PRIETO, DICTATORSHIP IN THE NINETEENTH CENTURY (2022); CHARLES RIVERS EDITORS, THE AGE OF TYRANTS: THE HISTORY OF THE EARLY TYRANTS IN ANCIENT GREECE (2018).

[353] Prominent among current dictators is Vladimir Putin of Russia whose repression at home and in Ukraine has become infamous. *See generally* GARY KASPAROV, WINTER IS COMING: WHY VLADIMIR PUTIN AND THE ENEMIES OF THE FREE WORLD MUST BE STOPPED (2015). Hungarian Prime Minister Viktor Orbán is another example of unforgiving twenty-first century autocrats. *See generally* PAUL LENDVAI, ORBAN: HUNGARY'S STRONGMAN (2018); *Afghanistan: Events of 2021*, HUM. RTS. WATCH, https://www.hrw.org/world-report/2022/country-chapters/afghanistan (last visited Feb. 2, 2023) (reporting on the depredations of the Taliban government in Afghanistan).

[354] *See* Heather Ashby, *Far-Right Extremism Is a Global Problem*, FOREIGN POL'Y (Jan. 15, 2021, 1:03 PM), https://foreignpolicy.com/2021/01/15/far-right-extremism-global-problem-worldwide-solutions/ (reporting on modern extremist "right-wing surge" across continents); *Europe and Right-Wing Nationalism: A Country-by-Country Guide*, BBC (Nov. 13, 2019), https://www.bbc.com/news/world-europe-36130006 (covering the rise of far-right politics in European countries); *How Far-Right Extremism Is Becoming a Global Threat*, ECONOMIST (Mar. 1, 2021), https://www.economist.com/international/2021/03/01/how-far-right-extremism-is-becoming-a-global-threat (reciting that the United Nations established that, between 2015 and 2020, the incidence of "far-right attacks around the world more than tripled").

[355] *Capitol Riots Timeline: What Happened on 6 January 2021?*, BBC (June 10, 2022) https://www.bbc.com/news/world-us-canada-56004916 (setting forth the facts of the January 6th insurrection in which right-wing forces aligned with then-President Trump when attempting to stop the certification of Joseph Biden's presidential election victory).

[356] *See* Susan H. Bitensky, Opinion, *The U.N. Should Implement an Armed Humanitarian Intervention to Help Ukraine*, JERUSALEM POST (Apr. 23, 2022, 4:08 PM), https://www.jpost.com/opinion/article-704894 (referring to Russia's hegemonistically motivated attack on Ukraine); *Ukraine Latest: War Reaches Seven Months; Putin to Speak Friday*, BLOOMBERG (Sept. 24, 2022, 1:49 PM), https://www.bloomberg.com/news/articles/2022-09-24/ukraine-latest-russia-s-invasion-reaches-its-seventh-month-mark (mentioning that the Russian military

The U.S. Supreme Court may not instantly come to mind when considering how best to insulate American democracy from damage or outright obliteration. Other branches of government as well as large sectors of the American people are apt to stand sentry and stalwartly defend democracy too. But they could use a high-power assist from the Court in the form of unequivocal recognition of a fundamental constitutional right to vote per se as implicit in a befitting constitutional clause.

If the Court finally sees its way to dispositive recognition of this right, it should steel our democracy against antagonists as no statutory or other right can do. The reason is that constitutionalizing a right as fundamental canonizes and eulogizes it,[357] thereby giving it intensified pedagogical effect. Law in general has long been understood to have gradual didactic sequelae[358] regardless of whether it is enforced or whether enforcement imposes punishment or financial detriment.[359] The attributes of law ensure this

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invaded Ukraine seven months before the publication of the article and reporting the aggressor's most recent machinations).

[357] *See* ARCHIBALD COX, THE COURT AND THE CONSTITUTION 25–27, 375–76 (1987); LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 26 (1985); THOMAS PAINE, *The Rights of Man*, *in* THE THOMAS PAINE READER 201, 287 (Michael Foot & Isaac Kamnick eds., 1987) (1791) (calling the Constitution our "political bible"); Anne Norton, *Transubstantiation: The Dialectic of Constitutional Authority*, 55 U. CHI. L. REV. 458, 459 (1988).

[358] *See* BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 96–97 (1924) ("The judge interprets the social conscience, and gives effect to it in law, but in so doing he [sic] helps to form and modify the conscience he [sic] interprets."); PAUL R. DIMOND, THE SUPREME COURT AND JUDICIAL CHOICE 1, 4–5 (1989) (contending that there is a continuing dialogue between the people and their lawmakers regarding the Constitution's meaning); Norton, *supra* note 357, at 468.

[359] *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024, 2033–34 (1996) (discussing how law's "statements" may influence behaviors apart from impacts of enforcement); Patricia Funk, *Is There an Expressive Function of Law? An Empirical Analysis of Voting Laws with Symbolic Fines*, 9 AM. L. & ECON. REV. 135, 135, 146–56 (2007) (ascertaining that Swiss voting-duty laws positively affected voting behavior although fines for violation were almost de minimis); Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 63–64, 68–69 (2002) (reviewing the practical effects of seatbelt laws via people changing their beliefs rather than weighing the consequences of legal penalties); *cf*. Robert Cooter, *Expressive Law and Economics*, 27 J.L. STUDS. 585, 597–607 (1998) (proposing three phases of internalizing law: aligning law with ethics; relying on people's respect for the law; and trusting to self-motivated improvements to inspire individuals to engage in

educational dynamic because law is, in a very real sense, a message from the state.[360] The state's imprimatur gives that message, whatever it may be, unparalleled heft.[361] Compared with the myriad communications we receive each day in the high noon of email, tweets, etc., law's communications are unmatched in authority, gravity, and clout. The impact is magnified many times over when that law is the Constitution.[362] Aside from its more immediate outcomes in litigation, the advent of a recognized fundamental constitutional right to vote per se would proclaim to all of the electorate—regardless of any individual's political proclivities—the glad tidings that democracy has a fighting chance to stay and flourish in America.

CONCLUSION

Most Americans believe that they have a fundamental unqualified constitutional right to vote.[363] The law does not support that belief.[364] Without locking in the right, the Court turns its back on a premier guarantee of democracy. Should the omission persist, the American people will continue to live within an increasingly vulnerable house of cards—a wobble or two away from the sort of tyranny the Constitution was meant to forefend. We should never forget that our country was recently the scene of a serious, bloody

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civic-minded behaviors). *But see* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1461–1500 (2000) (arguing that law has no expressive purposes).

360 *See* Geisinger, *supra* note 359, at 40–41.

361 *See id.*

362 *See supra* note 357 and accompanying text.

363 *See* Shapiro, *supra* note 249, at 196; Caleb Gayle, *Think the Constitution Guarantees Your Right to Vote? Think Again*, BOSTON GLOBE (Jan. 1, 2020, 12:01 AM), https://www.bostonglobe.com/2020/01/01/opinion/think-constitution-guarantees-your-right-to-vote-think-again/ ("The right to vote is something most Americans hold as sacred."); Vianney Gómez & Carroll Doherty, *Wide Partisan Divide on Whether Voting Is a Fundamental Right or a Privilege with Responsibilities*, PEW RSCH. CTR. (July 22, 2021), https://www.pewresearch.org/fact-tank/2021/07/22/wide-partisan-divide-on-whether-voting-is-a-fundamental-right-or-a-privilege-with-responsibilities/ (finding that 57% of Americans think voting is a fundamental right for all adult U.S. citizens that should "not be restricted in any way").

364 *See supra* notes 9–11 and accompanying text.

coup attempt; the insurrectionists' goal was not fair and democratic rule.[365]

At the first opportunity, the high Court should definitely and clearly secure the fundamental constitutional right to vote per se. The Constitution is positively rife with provisions immanently prefiguring the right's existence;[366] there are so many that the document all but ordains recognition. Because of this and as a policy matter of historic dimensions, withholding the right should no longer be an option.

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[365] *See supra* notes 355 and accompanying text.

[366] *See* Shapiro, *supra* note 249, at 206.